39676

STANLEY D. TILNEY,
Appellee,

v.

VILLAGE OF LaGRANGE PARK,
a municipal corporation,
GEORGE A. LANDRY, its
president, and ROY M. QUICK,
its treasurer,
Appellants.

APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

MR. PRESIDING JUSTICE FRIEND
DELIVERED THE OPINION OF THE COURT.

On December 31, 1936, Stanley D. Tilney, plaintiff, filed a mandamus proceeding against the Village of LaGrange Park and its officials, seeking the issuance of a peremptory order to pay him the sums of $2,400 and $300, respectively, together with interest, out of the general funds of the village, the amounts claimed being evidenced by two special assessment vouchers issued to him April 4, 1927. Motions of the defendants to strike the complaint and to dismiss the action were denied by the court and a rule entered upon them to answer. Thereupon defendants filed their answer and plaintiff interposed a motion and affidavit to strike the same and for summary judgment. Defendants thereupon filed their motion to strike plaintiff's "motion to strike answer of defendants and to enter a summary judgment for plaintiff," which was overruled by the court, and on May 28, 1937, defendants' answer was stricken for insufficiency, default was entered against them for want of any defense, plaintiff's motion for summary judgment was confirmed and sustained without the hearing of any testimony, and the court ordered the clerk to issue a writ of mandamus directing the defend-

[illegible] Appellee,

v.

[illegible]

VILLAGE OF [illegible],
a municipal corporation,
[illegible],
president, and [illegible],
its treasurer,
Appellants.

[illegible]
[illegible] OF THE [illegible]

On [illegible], 1960, [illegible] filed a mandamus proceeding against the Village of [illegible] and its officials, seeking the issuance of a peremptory order to pay him the sums of [illegible] respectively, together with interest, out of the general funds of the village, [illegible] being evidenced by two [illegible] more vouchers [illegible] 4, 1957. Motions of the defendants to quash the alternative writ and to dismiss the action were filed by the [illegible] upon trial on answer. Thereupon defendants filed [illegible] and [illegible] motion and [illegible] to quash the same and for summary judgment. Defendants thereupon filed [illegible] motion to quash plaintiff's motion to notice [illegible] of a final judgment to order a summary judgment for plaintiff," which [illegible] by the court, and on May 28, 1960, defendants [illegible] for [illegible], relief was entered by [illegible] of [illegible] defendants, plaintiff's motion for summary judgment was confirmed and sustained without the hearing of any testimony. [illegible] ordered the clerk to issue a writ of mandamus [illegible] the defend-

ants and each of them to pay forthwith to the plaintiff the principal sum of $2,700, together with interest and costs. Defendants appeal from the findings, orders and judgment thus entered.

From the material facts disclosed by the complaint it appears that on April 4, 1927, the Village of LaGrange Park issued a special assessment voucher to plaintiff for services rendered by him as commissioner in special assessment proceeding No. 449,649, Superior court, in the sum of $2,400, payable "from the funds to be obtained by collection of the First Installment" of said special assessment, "but out of no other installment, assessment or fund, and when and as so collected and in the Village Treasury." The voucher also provided that "In consideration of the issuing of this Voucher," the payee accepted the same "in full payment of the amount herein stated, and relinquish any and all claims or liens" against the Village "for the work mentioned herein, or, for the payment of this Voucher except from the collection of the installment herein named." It likewise appears that the ordinance upon which the Superior court proceeding was predicated, was drawn by the then attorney for the village, who now represents plaintiff, and it provided "that said improvements shall be made and the whole cost thereof, including the sum of $7,391.37 costs, being the amount included in said estimate of the President of the Board of Local Improvements as the cost of making, levying and collecting the special assessment herein provided for, be paid for by special assessment, in accordance with an Act of the General Assembly, entitled: 'An Act Concerning Local Improvements,' approved June 14, 1897, and the amendments thereto," which Act provides that, "The costs and expenses of maintaining the board of local improvements herein authorized, of paying salaries of the members of said board,

and the expense of making and levying special assessment or special taxes and of letting and executing contracts; and also the entire cost and expense attending the making and return of the assessment rolls and the necessary estimates, examinations, advertisements, etc., connected with the proceedings herein provided for, including the court costs, including the fees to commissioners in condemnation proceedings, which are to be taxed as above provided, shall be paid by the city, village or town out of its general fund: Provided, However, that in cities, towns or villages of this state having a population of less than five hundred thousand by the last preceding census of the United States, or of this State, the city, village or town, as the case may be, may in and by the ordinance providing for the assessment prescribed provide that a certain sum, not to exceed 6 per centum of the amount of such assessment, shall be applied toward the payment of the aforesaid and other costs of making and collecting such assessment. ***" (Illinois State Bar Stats., 1935, Chap. 24, par. 226, sec. 94, p. 396.)

In 1930 the Supreme Court of Illinois in Gray v. Black, 338 Ill. 488, held the ordinance in question void because it failed to determine the nature and character of the improvement, and thereafter the village, pursuant to the opinion of the Supreme Court, caused the proceeding in the Superior court to be dismissed. No demand was ever made upon any of the defendants for payment of the voucher or the amount designated therein out of the general funds or any other funds, and no adjudication was had in any court to determine plaintiff's right to any amount growing out of the transaction.

The principal questions presented for determination are, whether (1) the complaint states a cause of action in mandamus, and (2) if it does, whether the answer states a defense to the

complaint in the form in which it is drawn. The complaint is voluminous, occupying some eleven printed pages of the abstract. Without attempting to summarize it, it clearly appears that plaintiff is seeking to compel payment of the respective sums claimed by him out of the general funds of the village on a quantum meruit basis, and his complaint is in effect nothing more than a common law declaration in assumpsit. This raises the immediate question whether a petition for a writ of mandamus will issue under the allegations of the complaint. The law is well established by a long line of decisions in this state that mandamus, being an extraordinary remedy, will not lie unless the relator has a clear and undoubted right to the relief sought, which the party owing the duty has failed to perform. (Mann v. Downers Grove Sanitary District, 266 Ill. App. 526, 531; Coughlin v. Chicago Park District, 364 Ill. 90; People v. Hallihan, 284 Ill. App. 54; People v. Ames, 360 Ill. 31, 35; People v. Dixon, 346 Ill. 454.) And if the right of the relator must first be fixed and if the duty of the officer sought to be coerced must first be determined, mandamus is not the proper remedy. (People v. Dixon, 346 Ill. 454, 461.) In other words, before plaintiff is entitled to the writ of mandamus he must show not only a clear right to the acts sought to be enforced but defendants must have the legal duty to perform such acts. (People v. Wallace, 247 Ill. App. 489.) It clearly appears from the record that the fund in this proceeding failed, the Supreme court having invalidated the ordinance upon which the proceeding was predicated, and defendants having dismissed the action in the Superior court. It therefore appears that under the authorities cited, plaintiff must of necessity establish his clear and undoubted right to compensation for services out of the general fund of the village in an action of assumpsit or other appropriate action before a mandamus will lie. The law applicable is well stated in Mann v. Downers Grove Sanitary

District, 266 Ill. App. 526, wherein the court said (p. 532): "It (mandamus) is an extraordinary remedy, and one petitioning for such writ must have a clear and undoubted right to the relief demanded. (People v. Nelson, 346 Ill. 247.) The writ can confer upon the respondent no new authority to act and he must be bound to act regardless of the writ. Where the right of the petitioner must first be fixed, or the duty of the respondent must first be determined, the writ will be denied. Hooper v. Snow, 325 Ill. 53; People v. Dunne, 258 Ill. 441." The courts of this state have consistently applied the doctrine here enunciated to cases of this kind.

We are not called upon to determine whether or not plaintiff is entitled to recover for his services on a quantum meruit basis, but before he can maintain an action for mandamus he must first establish his right to recover against the general fund in assumpsit or other appropriate proceeding; and judgment thus had might constitute the basis for a mandamus proceeding. (Mann v. Downers Grove Sanitary District, 266 Ill. App. 526.) Plaintiff's right in this proceeding must stand or fall on the representations made in his petition. He claims that by force of statute his fees became due and payable out of the general funds of the village, and that therefore the writ should issue, but inasmuch as the ordinance was declared void and the proceedings were dismissed, he cannot predicate his claim for mandamus upon funds which never became available by reason of the invalidity of the ordinance and dismissal of the proceeding, and if he has any right to be paid out of the general fund he must first establish that right in an appropriate action at law, before the writ of mandamus will issue against the officials of the village commanding them to make the payment.

With reference to the item of $300, the record discloses that this voucher issued in special assessment No. 52, County

Dietrich, 300 Ill. [illegible] 5'6, [illegible] "It (mandamus) is an extraordinary remedy, and [illegible] for such writ must have a clear [illegible] demanded. (People v. Johnson, 368 Ill. [illegible]) The writ can [illegible] upon the respondents no [illegible] to not [illegible] must first be fixed, or [illegible] determined, the writ will be denied. (Light v. Moe, [illegible] 55; People v. Wynne, 386 Ill. [illegible] have consistently applied the foregoing [illegible] of this kind.

We are not called upon to determine [illegible] is entitled to recover for his services on a quantum meruit [illegible] but before he can maintain an action for mandamus he must first establish his right to recover [illegible] or other appropriate proceeding [illegible] substitute the best for a mandamus proceeding. (Mann v. Lowmans Grove Lumber Matrich, [illegible] 1926). [illegible] in this proceeding [illegible] in his petition. He claims [illegible] one and [illegible] therefore the writ should issue. [illegible] or desired relief and the prayer [illegible] practice or of law [illegible] available by reason of the [illegible] of the proceeding, [illegible] several times he may [illegible] the writ of mandamus [illegible] he must first establish [illegible] action at law, before the [illegible] officials of the village [illegible] with reference to the [illegible]

that this voucher issued in [illegible] assessment [illegible]

court of Cook county, but plaintiff would not be entitled to recover this sum in a mandamus proceeding for the same reasons as are applicable to the $2,400 voucher. If he is entitled to recover this sum at all, he would have to show that the funds collected in the assessment were diverted to the general corporate funds of the village. Defendants' answer denies that there was such a diversion of funds, and also denies that a proper demand was made, and this creates issues of fact which were never tried and cannot be tried in a mandamus proceeding.

Various other points are argued in the briefs of the respective parties, but in view of our conclusion that mandamus will not lie, it is unnecessary to discuss them. The judgment of the Superior court is reversed and the cause remanded with directions that the complaint be dismissed at plaintiff's costs. Nothing that we have said herein is intended to preclude plaintiff from further prosecuting his action in assumpsit, either by way of new suit or amendment of this proceeding, if it can be amended under the Civil Practice act.

REVERSED AND REMANDED WITH
DIRECTIONS.

Scanlan and Sullivan, JJ., concur.

[illegible] court of [illegible] county, [illegible] could not be entitled to recover this sum in a round sum [illegible] for the [illegible] are applicable to the [illegible] workers. If he is entitled to recover this sum at all, he would have to [illegible] the funds collected in the [illegible] ment are advertised to be expended corporate funds of the village. [illegible] such a division of funds, and [illegible] was made, and this [illegible] and cannot be tried in a round sum [illegible].

Various other points [illegible] respective parties, but in view of the conclusion [illegible] will not lie, it is unnecessary to discuss them. The judgment of the superior court is reversed and the cause remanded with directions [illegible] Motion [illegible] from further proceeding [illegible] new suit or [illegible] under the civil [illegible].

[illegible]

[illegible] Conklin and Sullivan, JJ., concur.

40077

SHELL PETROLEUM CORPORATION,
a corporation,
Appellee,

v.

NATHAN R. FELDMAN, DAVID FELDMAN,
LEONARD FELDMAN and ABRAHAM FELD-
MAN, doing business as FELDMAN
PETROLEUM COMPANY,
Appellants.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

297 I.A. 651

MR. PRESIDING JUSTICE FRIEND
DELIVERED THE OPINION OF THE COURT.

Shell Petroleum Corporation, plaintiff herein, recovered a judgment in replevin against defendants for the right to possession of certain personal property located at a gasoline filling station, commonly known as 7521 Addison avenue, Chicago, from which defendants appeal.

The essential facts disclose that plaintiff is a wholesale dealer and defendants Nathan R., David, Leonard and Abraham Feldman, doing business as Feldman Petroleum Company, are wholesale and retail dealers in petroleum products. The personal property replevied was equipment used in the dispensing of these products at the premises 7125 Addison avenue, Chicago, and is described in the replevin writ as follows: "2 Bennett Electric Meter Gasoline Pumps, Serial Numbers M-3291C and M-3328C; 5 60 Gallon Bennett Lubsters, Serial Numbers MC-9236, 9279, 9284, 9238, 9347, respectively; 2 Underground Tanks - Capacity 1000 and 550 Gallons, respectively." At the time of the service of the replevin writ and for several years prior thereto the premises on which the equipment was installed were owned by one Frank Yontorn. During this period he had leased the property to

successive lessees to be used for the operation of a filling station.

Plaintiff acquired the replevied chattels by bill of sale from the Standard Oil Company December 19, 1934. Subsequently, February 1, 1935, one Marcel Sutter leased the premises from Yontorn. The lease included the equipment replevied herein under a gasoline sales contract for a term of one year, the equipment to be used on premises by Sutter in the dispensing of petroleum products to be bought from plaintiff. At the time of this lease Yontorn gave plaintiff a written acknowledgment of its title to and its right to remove the equipment. Later, July 9, 1936, one Dave Richmond became the lessee of the premises and plaintiff, under a similar contract, leased the equipment to Richmond for the term of one year. Again Yontorn acknowledged plaintiff's title to and right to remove said equipment and agreed to give plaintiff written notice of any surrender by the lessee, Richmond, of his rights under this lease covering the premises. During the first year of the term of the lease Richmond surrendered his rights as lessee, but notwithstanding Yontorn's agreement with plaintiff, he failed to notify Shell Petroleum Corporation of the surrender. Thereafter, April 15, 1937, the Feldman Petroleum Company took possession of the premises as Yontorn's lessees, also for the purpose of operating a filling station. The chattels in question were then still located on the premises and were there at the time of the service of the replevin writ.

July 2, 1937, plaintiff notified the Feldmans of its ownership of the equipment and billed them in the sum of $340 as the value thereof, and in November of that year plaintiff requested the Feldmans to pay for the equipment, to which defendants replied that it was part of the real estate and that they had leased it from

their landlord, Yontorn. December 6, 1937, plaintiff's agent called at the filling station and made an effort to remove the equipment, but was ordered off the premises.

The replevin proceedings were thereupon filed and upon service of the writ the bailiff of the municipal court accepted from defendants a forthcoming bond covering the identical property described in the writ.

In their affidavit of defense the Feldmans interposed five separate defenses, as follows: (1) That plaintiff is not lawfully entitled to possession of the property; (2) that the property is not unlawfully detained by them; (3) that the total value of the property as set out in plaintiff's statement of claim was not $340; (4) that defendants have not detained any property belonging to plaintiff, and were therefore not liable for any damages for the alleged detention; and (5) a general denial that plaintiff is entitled to a writ of replevin or to any damages for the alleged detention.

The judgment in replevin is as follows: "Trial by Court resumed, finding right of property in plaintiff in replevin or in the alternative upon payment of One Hundred Sixty Dollars ($160) by the defendants to the plaintiff finding property in replevin in defendants, damages One Cent. Judgment on finding for plaintiff in replevin or in the alternative upon payment of One Hundred Sixty and no/100 Dollars ($160) by the defendants to the plaintiff judgment on finding for defendants in replevin, damages One Cent and costs. Execution stayed ten (10) days."

It is first urged as ground for reversal that plaintiff failed to prove by a preponderance of the evidence that the personal property in question was its property and that it was entitled to the immediate possession thereof. It is argued that no identification was made of the chattels. It appears, however, that the bill

their Lordships, Lord Atkinson, Lord Shaw of Dunfermline, Lord Parmoor and Lord Wrenbury.

The replevin proceeding was a summary remedy given by service of a writ as a result of the wrongful taking of goods from defendants. The defendants contended that a proper proceeding described in the writ.

In their statement of defence the defendants inter-posed the separate defences, as follows: (1) That the plaintiff was not lawfully entitled to possession of the property; (2) [illegible] not wrongfully detained by them; (3) [illegible] of the property set out in plaintiff's statement of claim was not [illegible]; (4) that defendants have not detained any property belonging to plaintiff, and were therefore not liable for any damages for the alleged detention; and (5) [illegible] entitled to [illegible] of replevin [illegible] for the alleged detention.

The judgment in replevin is [illegible] "Trial by jury resumed, finding right of property in plaintiff in replevin or in the alternative upon payment of [illegible] by the defendants to the [illegible] property in replevin in defendants, Damages One Cent. [illegible] finding for plaintiff in replevin or in the alternative [illegible] and no/100 Dollars ([illegible]) by the [illegible] and judgment on finding for defendants in replevin, damages [illegible] costs. Restitution stayed ten (10) days."

It is first argued as ground for reversal that the plaintiff failed to prove by a preponderance of the evidence that the [illegible] property in question was his property [illegible] to the immediate possession thereof. It is argued that no identification was made of the chattels. It appears, however, that the [illegible]

of sale from the Standard Oil Company to plaintiff, dated December 19, 1934, as well as the two contracts and equipment leases, dated respectively February 1, 1935, and July 9, 1936, between plaintiff, the defendant Yontorn and the latter's lessees, Sutter and Richmond, all describe the same equipment and designated it as being located at 7125 Addison street. All of these instruments, which were introduced in evidence, established title to the chattels in plaintiff. The contract of February 1, 1935, identified the equipment by the same serial numbers which appear in the forthcoming bond given to the bailiff of the municipal court by the Feldmans, and Yontorn testified that for 12-1/2 years there had been no change in the equipment on the premises. When the replevin writ was served on defendants they declared that all the equipment they took over on February 15, 1937, was still on the premises, and no evidence appears of record indicating that any similar equipment was ever present on the premises with which plaintiff's chattels might have become confused. We think this evidence sufficiently identified the chattels.

It is further urged that in the absence of provisions of the lease to the contrary, the tenant must remove trade fixtures before he quits possession or else he is deemed to have lost and abandoned them. The contract between plaintiff and Richmond and the defendant Yontorn was for a term running from July 9, 1936, and from year to year thereafter, and gave plaintiff a period of 90 days after its expiration within which to remove the equipment. It also provided that Yontorn, the landlord, would notify plaintiff of any surrender by Richmond of his rights under the lease to the premises, but Yontorn failed to apprise plaintiff of the surrender by Richmond, and by withholding such notification to plaintiff, in violation of his agreement, Yontorn certainly could not establish any right or title to the equipment in himself or in defendants as his subsequent lessees. Under the circumstances it cannot be

claimed that this constituted an abandonment of the chattels by plaintiff. (Wofford Oil Co. v. Weems-Fuller Co. (Ga.) 142 S. E. 387.)

Although defendants' affidavit of merits does not specifically aver that the chattels in question constituted fixtures and therefore became a part of the realty, it is now urged that replevin will not lie to remove part or parcels of personal property which have become attached to the real estate. This contention might well be disposed of under the well settled rule in this state that a defendant who files an affidavit of defense waives all defenses not therein set forth. (Allen v. Watt, 69 Ill. 655; Miller v. Thomas, 200 Ill. App. 125.) Moreover, it appears that except as to the 550 and 1000 gallon tanks the record contains no evidence whatever indicating any annexation of the chattels to the real estate on which it was located, and the fact that all the equipment, including these tanks, was installed and maintained on the filling station under express agreements between Yontorn, the landlord, his successive lessees and plaintiff, reserving in plaintiff the right to possession and removal of the property, precludes any claim that the chattels became a part of the real estate.

Another contention advanced by defendants is that they derived title to the equipment under a bill of sale from Ace Petroleum Company on January 3, 1938. They say they paid a consideration of $35 for the chattels. It appears, however, that prior to that date plaintiff had notified defendants that it would procure and later that it had obtained a disclaimer covering the equipment from Ace Petroleum Co. There is no evidence to show that the latter ever acquired any right or title to the equipment subsequent to the execution of the disclaimer and prior to the delivery of the bill of sale to the Feldmans.

During the pendency of this proceeding plaintiff moved to dismiss the appeal on the ground that the record and abstract fail to show that defendants had served their notice of appeal on Frank Yontorn, as required under Rule 34, par. 1 of the Rules of the Supreme court. Defendants answer to this contention is that Yontorn was dismissed from the proceedings. The record is not entirely clear, but inasmuch as we have determined the cause on its merits the motion will be denied.

We find no convincing reason for reversing the judgment of the municipal court. In fixing the value of the equipment replevied at only $160, and allowing defendants the election either to return the property or pay $160, and awarding plaintiff only one cent nominal damages and allowing nothing in damages for defendants' use of the equipment from April 1, 1937, until the time of the trial, the trial court showed defendants every reasonable consideration. The judgment of the municipal court is therefore affirmed.

JUDGMENT AFFIRMED.

Scanlan and Sullivan, JJ., concur.

[illegible] the grounds of [illegible]
to dismiss the appeal in [illegible] or
fail to show that defendant in [illegible] of
on Frank Voutors, [illegible] of
of the supreme court. [illegible]
that York in [illegible] dismissed from the [illegible]
not exist by [illegible], but inasmuch as we have [illegible]
on the merits we no longer will be [illegible].

We find no [illegible] in the judgment
of the municipal court. [illegible]
replaced at only [illegible]
either to return the property [illegible]
only one cent nominal damages and [illegible]
determined use of the equipment [illegible]
time of the trial, the trial court [illegible]
able could return. The judgment of the municipal court is
therefore affirmed.

[illegible]

Gaynlen and Gillivan, [illegible], concur.

40114

GEORGE S. GRAGG,
Appellee,

v.

PRIMO PASQUALINI,
Appellant.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

297 I.A. 631

MR. PRESIDING JUSTICE FRIEND
DELIVERED THE OPINION OF THE COURT.

George S. Gragg, plaintiff, sued to recover damages for injuries received as the result of a collision between his automobile and one operated by defendant. Defendant filed a counterclaim seeking also to recover for damages growing out of the same accident. Trial was had by jury, resulting in a verdict for $1,000 in favor of plaintiff, upon which judgment was entered, and defendant appeals.

From the essential facts disclosed by the evidence it appears that at about 4 o'clock on the afternoon of September 26, 1936, plaintiff was driving a fairly new Ford V-8 automobile in an easterly direction on highway 20, approximately a mile west of Elgin, Illinois. He was coming from Clinton, Iowa, and proceeding to Chicago. It was raining lightly at the time and the pavement was wet, but visibility was good. Highway 20 is a two-lane concrete highway, 18 feet wide. The evidence discloses that plaintiff had been driving automobiles for some twenty-five years and on the day in question his car was in perfect condition.

Plaintiff's version of the accident as set forth in the abstract of record is as follows: "When about a mile west of Elgin, just as I came to the crest of a grade, which I had been ascending, I noticed a car coming toward me on the opposite side

GEORGE C. [illegible],
Appellee,

v.

PRIMO [illegible],
Appellant.

[illegible] DISTRICT OF ILLINOIS,
[illegible] DIVISION.

MR. JUSTICE [illegible] DELIVERED THE OPINION OF THE COURT.

George C. [illegible], plaintiff, sued to recover damages for injuries received as the result of a collision between his automobile and one operated by defendant. Defendant filed a counterclaim seeking also to recover for damages in connection with one of the same accidents. Trial was had by jury, resulting in a verdict for $1,000 in favor of plaintiff, upon which judgment was entered, and defendant appeals.

From the evidence fairly disclosed by the evidence it appears that on about 4 o'clock on the afternoon of [illegible] 26, 1926, plaintiff was driving a Ford automobile in an easterly direction on Highway No. [illegible] approximately a mile west of Elgin, Illinois. [illegible] was coming from the direction [illegible] proceeding to Elgin. It was raining, it July [illegible] the time and the pavement was wet, but visibility was good. Highway No. [illegible] is a concrete highway, in fact wide. The evidence discloses that plaintiff had been driving automobiles for some twenty-five to [illegible] and on the day in question his car was in perfect condition.

Plaintiff's version of the [illegible] set forth in the abstract of record is as follows: "I was about a mile west of Elgin, just as I came to the crest of a grade, which [illegible] been according, I noticed a car coming toward me on the opposite side

of the road about 125 feet from me at the time I saw it. Just as I got over the grade this car turned directly in front of me when I was not more than forty feet from it. I hardly had time to apply the brakes when I collided with it. At the time I first saw this approaching car I was going about forty miles an hour. At the time of the collision I had decreased my speed very little, if any. I applied the brakes as quick as I could, but what I could do there didn't check the speed. I didn't have time to check the speed but very little. At the instant of the collision I was going approximately thirty-five to forty miles an hour.

"This automobile was about forty feet away from me when it began to turn south. No signal was given from the other car or in the other car. At the place of the accident there was no crossroad crossing highway 20. Highway 20 runs east and west at this point.

"When the two automobiles came together, it threw me against the steering wheel with my chest. I didn't lose consciousness at any time. When I got out of the car my automobile was headed east on the pavement with the rear end bounced around a little toward the center of the road. The other automobile was crosswise of the south side of the road, in front of me. The front wheels of the other automobile were off of the pavement and the remainder of it was on the pavement. The front end of my car struck the other car, a Buick, almost even with the front door, a little back of the front wheel. There were two men in the other automobile.

"There is a barbecue stand on the south side of highway 20 at this point. It might have been a little to the east or west of a point straight south of the accident. When I first saw this car, I was going about forty miles an hour. When I first saw this car turn, it turned a little southwest. It traveled about twelve feet from the time it turned until the time of the impact, that is, in

of the road about 125 feet from me at the time I saw it. That is as I got over the grade this car turned directly in front of me when I was not more than forty feet from it. I hardly had time to apply the brakes when I collided with it. At the time I first saw this approaching car I was going about forty miles an hour. At the time of the collision I had decreased my speed very little, if any. I applied the brakes as quick as I could, but what I could do there didn't check the speed. I didn't have time to check the speed but very little. At the instant of the collision I was going approximately thirty-five to forty miles an hour.

"This automobile was about forty feet away from me when it began to turn south. No signal was given from the other car or in the other car. At the place of the accident there was no crossroad crossing Highway 20. Highway 20 runs east and west at this point.

"When the two automobiles came together, it threw me against the steering wheel with my chest. I didn't lose consciousness at any time. When I got out of the car my automobile was headed east on the pavement with the rear end pointed around a little toward the center of the road. The other automobile was crosswise of the south side of the road, in front of me. The front wheels of the other automobile were off of the pavement and the remainder of it was on the pavement. The front end of my car struck the other car, a Buick, almost even with the front door, a little back of the front wheel. There were two men in the other automobile.

"There is a barbecue stand on the south side of Highway 20 at this point. It might have been a little to the east or west of a point straight south of the accident. When I first saw this car, I was going about forty miles an hour. When I first saw this car turn, it turned a little northwest. It travelled about twelve feet from the time it turned until the time of the impact. That is, in

crossing the road. As I remember, at the time of the impact, the front wheels of the other car were just off the pavement, a little to the south. After the impact it stopped right there. The front wheels might have been off the south edge of the pavement about three feet. I might be wrong a foot or eighteen inches one way or the other. The other car was not completely off the pavement after the impact.

"When the other car started to turn to the south or the southwest, I was about forty feet away. I couldn't estimate his speed. I had an idea to change my direction, but had no time. I possibly pulled the car in an endeavor to dodge it, maybe a foot, but I had no time to get any place. I applied the brakes as quick as I could after I saw the car turn in front of me. I didn't get them all there in time to check the speed of the car but very little. I would say I was travelling thirty-five to forty miles an hour when I struck the other car. I couldn't say within what distance I could bring my car to a stop going forty miles an hour on that wet pavement. I was on my own side of the road and did not leave that portion of the road after I saw this car. I started to change the direction to the right, but I had no time to get any place before I collided with the car. I didn't have time to pull the car around on either side. My Ford had a 110 inch wheel base, and four-wheel mechanical brakes. I had just gone through the safety lane before I left on this trip, and my brakes were in perfect condition."

Harold F. Hobert was a disinterested eyewitness to the accident who, at the time of the occurrence, happened to be standing in a tavern south of the highway and was looking out of a window where he could see both cars approaching each other. He described the events leading up to the accident, as follows:
"I saw a car going east, coming over the crest of the hill, and a car also coming from the other direction. This latter car turned

crossing the road. As I remember, at the time of the impact, the front wheels of the other car were just off the pavement, a little to the south. After the impact it stopped right there. The front wheels might have been off the south edge of the pavement about three feet. I might be wrong a foot or eighteen inches one way or the other. The other car was not completely off the pavement after the impact.

"When the other car started to turn to the south or the southwest, I was about forty feet away. I couldn't estimate my speed. I had no idea to change my direction, but had no time. I possibly pulled the car in an endeavor to dodge it, maybe a foot, but I had no time to get any place. I applied the brakes as quick as I could after I saw the car turn in front of me. I didn't get them all there in time to check the speed of the car any little. I would say I was travelling thirty-five to forty miles an hour when I struck the other car. I couldn't say within more distance I could bring my car to a stop, using forty miles an hour on the wet pavement. I was on my own side of the road and did not leave that position of the road after I saw this car. I attempted to change the direction to the right, but had no time to carry my plan before I collided with the car. I didn't have time to pull the car around on either side. My Ford had a hydraulic wheel brake, and four-wheel mechanical brakes. I had just gone through the Ferry Lane where I left on this trip, and my brakes were in perfect condition."

Harold T. Hobart was a disinterested eyewitness to the accident who, at the time of the occurrence, happened to be standing in a tavern south of the highway and was looking out of a window where he could see both cars. He gave the following description of the event leading up to the collision:

"I saw a car going east, coming over the crest of the hill, and a car also coming from the other direction. The first car turned

directly in front of the car coming east and there was a collision. The left-hand front fender of the car going east collided with the right front of the car that was turning. The collision took place in the eastbound lane of traffic. The eastbound car was a Ford V-8, and the other car was a Buick. After the accident, the Ford was setting partially off the shoulder in the eastbound lane of traffic. The Buick was setting with the front wheels just at the edge of the south edge of the cement in the same lane of traffic. The back of the Buick was approximately over the black line in the center of the cement.

"I took the three occupants of the car to the hospital.

"I would say the eastbound Ford was traveling between thirty-five and forty miles an hour. The westbound Buick, before there was any change in its direction, was going fifteen or twenty miles an hour. The two cars were about forty or forty five feet apart when the Buick started to turn across the highway. I could see the whole picture as I was looking out of the south window of the tavern. I did not see any signal in any way from the Buick indicating a turn. The front windows of the Buick were closed after the accident. The two men in the Buick were in the front seat. The Buick made a left turn across the highway and the Ford tried to turn off on the shoulder. He just got started off the shoulder when the collision occurred. The lights were burning on the Ford but not on the Buick.

"The tavern was sixty-five or seventy feet south of the highway. I was looking north. There was nothing in particular that attracted my attention to the Ford. When the Buick started to turn, I knew there would be an accident. I saw the Buick for fifteen or twenty feet back from the point where he started to turn. I observed the speed of the Ford forty or forty-five feet. The Buick started to turn about the time I noticed the Ford. They were about 40 feet

directly in front of the car coming [illegible] the collision. The left-hand front bumper of the car [illegible] the right front of the car that was turning. The collision took place in the southbound lane of traffic. The car [illegible] V-8, and the other car was a Buick. [illegible] the road was setting practically off the road in the northbound lane of traffic. The Buick was setting [illegible] edge of the south edge of the [illegible] lane of traffic. The back of the Buick was approximately over the [illegible] in the center of the roadway.

"I took the three occupants of the car to the hospital.

"I would say the speed limit was [illegible] between thirty-five and forty miles an hour. The weather [illegible], before there was any change in the direction, was [illegible] or twenty miles an hour. The two cars were about forty or forty-five feet apart when the Buick started to turn across the highway. I could see the whole picture as I was looking out of the south window of the tavern. I did not see any signal on any [illegible] the Buick indicating a turn. The front [illegible] of the Buick was [illegible] the accident. The two men in the Buick were in [illegible] front seat. The Buick made a left turn across the highway and the [illegible] to turn off on the shoulder. The first [illegible] off the shoulder when the collision occurred. The lights were burning on the Ford but not on the Buick.

"The tavern was sixty-five or seventy feet south of the highway. I was in the north. There was nothing in [illegible] attracted my attention to the Ford. [illegible] I knew there would be an accident. I saw the Buick for fifteen or twenty feet back from the place where it started to turn. I observed the speed of the Ford forty or forty-five [illegible] the Buick [illegible] to turn about the time I noticed the Ford. My area about 40 feet

apart. The Buick traveled fifteen or twenty feet before it started to make its lefthand turn. It turned vertical, almost straight in front of the Ford. From the point where the Buick started to turn until the point of the impact it had gone about six or eight feet. When the impact occurred, the front wheels of the Buick were just about off the south edge of the pavement. The road is eighteen feet wide at that point. The rear wheels of the Buick were slightly north of the center line of the cement, about two or three feet. There was probably six feet between the rear of the Buick and the north end of the pavement. The road was wet and it was raining lightly. It had been raining light all afternoon. I had been in the vicinity all day."

As against the evidence of those witnesses, defendant's testimony, as appearing in the abstract, may be summarized as follows: "In September of 1936 I owned a Buick, 1929, four-door Sedan. It was equipped with four A-No. 1 brakes. On that day I was involved in an accident on Route 20, west of Elgin. I had been squirrel hunting near DeKalb. I entered Route 20 in Elgin and was proceeding west on the north side of the road. It is eighteen feet wide. After I left Elgin I was traveling twenty-five to thirty miles an hour. It was raining pretty fast before we got to the place of the accident. I was going to the barbecue stand, which is about one mile or a mile and a quarter west of Elgin, on the south side of the road. It is about 110 or 115 feet south of the paving. There is a hill about 200 feet west of the barbecue stand. The stand is owned by John Stapratti. It was about 5:45 and still daylight. As I approached the barbecue stand I was traveling twenty to twenty-five miles an hour. The road was wet and pretty slippery. It was raining heavy. The road was oily, Tarvac on the track in the road.

apart. The Buick traveled fifteen or [illegible] feet before [illegible] started to make its leftward turn. It turned vertically, [illegible] in front of the Ford. From the point where the Buick started to turn until the point of the impact it had gone about six or eight feet. When the impact occurred, Mr. [illegible], driver of the Buick were just about off the north edge of the pavement. The road in eighteen feet wide at that point. The tracks made by the Buick were all fully north of the center line of the pavement, about two or three feet. There was probably [illegible] between the rear of the Buick and the north end of the pavement. The road was wet and it was raining hard. It had been raining slightly all afternoon. I had been in the vicinity all day."

As against the evidence of [illegible] Sue, defendant's testimony, as appearing in the record, may be summarized as follows: "In September of 1952 I owned a [illegible] 1952 four-door Sedan. It was equipped with four [illegible]. I drove on that day I was involved in an accident on Route 20, east of Lyon. I have been equipped hunting near [illegible]. I [illegible] 20 in Lyon and was proceeding west on the north side of the road. It is [illegible] feet wide. After I left Lyon I was travelling [illegible] miles an hour. It was raining heavily. Just before we got to the place of the accident, I was going to the [illegible] Lyon, on the south side of the road. It is [illegible] with the pavement. There is a hill above [illegible] the [illegible] road. The stand is owned by John [illegible]. [illegible] hill daylight. As I approached the [illegible] to twenty-five miles an hour. The [illegible] heavily. It was raining heavily. The [illegible] on the truck in the road.

"I saw Mr. Gragg's car about 175 feet away from the place where the accident happened. I saw his car at the top of the hill when I was about 175 feet away from the hill. I looked behind and saw nobody following me. All I could see was Mr. Gragg's car, so I started to turn, but he was coming too fast, and he passes into me and I stopped. I was 175 feet away from Mr. Gragg's car. I turned to the left, first starting to the southwest. I didn't go no further because his car came over to me. I last saw Mr. Gragg's car when it was about ten or firteen feet away from me. When I first saw it, it was about 175 feet away. He was going about fifty miles an hour. Before the accident happened I was going up a small hill. I could see to the top of the hill, but I could not see beyond the top. When I first saw this automobile going east, I had not reached the top of the hill. I turned before I reached the top of the hill. The other automobile was right at the top of the hill, when I saw it before I turned. The other automobile was about 135 or 140 feet away from me when I turned to the south. I turned southwest and then kept on until the collision came. One front wheel and one back wheel was off of the pavement. The other car hit the right front of the first door and the center door of my car. The other car was 135 or 140 feet away from me when I started to spring off. At that time it looked to me as if that car was coming pretty fast, about fifty miles an hour. I tried to give my car more gas and get out as fast as I can, but I can't get out any more. Before I started to turn I began to give it more gas. I did not give this man a signal, it was raining too much. I had the window closed all day long, closed it as soon as it started to rain. The window by which I was sitting was closed all the time and I never put it down. The window on the other side was closed. I didn't put my hand out and I didn't put any part of my arm out. I didn't give any kind

of a signal that I was going to turn. I just turned. *** I did not blow the horn at any time. When I started to turn across the road my automobile was going between 20 and 22 miles an hour and I continued across at that speed."

Peter Passaretti, who was riding in defendant's car, sitting in the front seat to the right of defendant, testified that he first saw plaintiff's car coming from the west when it was 160 or 175 feet away. On further examination by his counsel he was asked this question: "Q. Did you see this other car when your car turned southwest? A. Yes, just he turning. I see it when it was about 30 feet away, when he started to turn." And on further examination by his counsel he testified as follows: "Q. Well, how far away was this other car when you started to turn? A. When it started to turn, just about - I don't know, well, it was about 30 feet, I think. Q. The other car was 30 feet away from you? A. Yes." At various other times in the examination of this witness he testified that plaintiff's car was about 30 feet away when defendant began to turn his car to the left. It also appears from the testimony of Passaretti that he anticipated the collision immediately when defendant started to turn to the left, for he testified as follows: "When I see the other car coming I grab for Pasqualini, you know. Q. You made a gesture then, you mean you were afraid of being hit? A. Sure. I got to the other seat. Q. When was it that you made that move? As you say you jerked back because you were afraid of being hit, was that when Pasqualini started to turn across? A. Yes."

It is first urged as ground for reversal that the verdict is manifestly against the weight of the evidence. Defendant's counsel contends that plaintiff failed to prove that he was in the exercise of due care and caution at the time of and immediately

of a signal that I [illegible] did not blow the horn [illegible] the railway [illegible] and I continued [illegible] at [illegible] years.'

[illegible] sitting in the front seat to the [illegible] then he first [illegible] was 100 or 150 feet away. [illegible] he was asked this question: "[illegible] your car warned [illegible] when it [illegible] on further examination [illegible] "Q. Well, how far away [illegible] turn? A. [illegible] wall, it [illegible] feet away from your [illegible] A. Yes." [illegible] of this witness he testified [illegible] feet away when [illegible] also negative [illegible] the coil [illegible] left, for [illegible] "[illegible] the other [illegible] seeing a grade [illegible] then, you meant [illegible] to an [illegible] you say you [illegible] was that when [illegible]

In his first [illegible] is manifestly [illegible] counsel were not there [illegible] the exercise of no [illegible] of [illegible] reasonably

before the accident, and that he has also failed to sustain the burden of establishing negligence on the part of defendant.

No novel questions of any import are involved. The law is well settled that it is incumbent upon the party seeking to recover to allege and prove by a preponderance of the evidence that he was in the exercise of due care and caution for his own safety at the time of and immediately before the accident, and that defendant was guilty of negligence. The jury were so instructed and were evidently of the opinion that plaintiff maintained the burden cast upon him. Under the instructions of the court they found the issues in favor of plaintiff. We have set out the substantial portions of the evidence, pro and con, and it would serve no useful purpose to further discuss or analyze the substance of the testimony adduced by the respective parties. It seems to us clear, however, that plaintiff, who was an experienced driver, was proceeding in an easterly direction at a reasonable rate of speed; that he remained in the right hand lane where he belonged at all times, and that the jury were justified in finding that he was in the exercise of due care and caution for his own safety. On the other hand, defendant's testimony and that of his witness indicates that he turned to the left when plaintiff's car was only a short distance ahead without signalling or in anywise apprising plaintiff of his intention so to do, making it impossible for plaintiff to bring his automobile to a stop within a short distance so as to avoid the accident. After a careful examination of the record we are satisfied that the verdict is amply sustained by the evidence and that the contention of defendant that the court should have directed a verdict in his favor is without merit.

Defendant complains of an instruction in which the court charged the jury that plaintiff was not required by law to establish his case beyond a reasonable doubt, but merely to prove it by a preponderance or greater weight of the evidence. His counsel

before the [illegible], and [illegible] he [illegible] the burden of establishing negligence on the part of defendant.

No novel questions of law [illegible] are involved. The [illegible] is well settled that it is [illegible] upon the [illegible] seeking to recover to allege and prove [illegible] that he was in the exercise of [illegible] safety [illegible] time of [illegible], and that defendant was guilty of negligence. The jury [illegible] attached and were evidently of the opinion that [illegible] tained the burden [illegible]. Under [illegible] court they found [illegible] in favor of [illegible]. [illegible] out the substantial portions [illegible] it would serve no useful purpose [illegible] the substance of the [illegible] by [illegible]. It seems to me clear, however, that [illegible] driver, [illegible] of speed [illegible] at all times, [illegible] was in the exercise [illegible] on the ovid [illegible] indicate [illegible] short distance [illegible] plaintiff [illegible] tiff to bring his automobile [illegible] as to avoid the [illegible] so are a [illegible] dence and [illegible] have distorted [illegible] in his [illegible].

Defendant [illegible] charged the jury [illegible] his case beyond a reasonable doubt, but [illegible] preponderance or [illegible] of the evidence. His counsel

do not contend that this instruction does not properly state the law, but say that the court failed to "define what plaintiff's case consists of." We find, however, that the instruction was one of a series of instructions, and that by an instruction given at defendant's request the jury were charged as follows: "The court instructs the jury that before the plaintiff, George S. Gragg, can recover in this case he must prove by a preponderance of greater weight of the evidence each and all of the following propositions: 1. That the defendant, Primo Pasqualini, was guilty of some negligent act or omission charged in the plaintiff's complaint at law. 2. That immediately before and at the time of the accident the plaintiff, George S. Gragg, was in the exercise of ordinary care of his own safety. 3. That the negligence of the defendant, if any, was the proximate cause of the accident." This instruction was approved in Chicago City Railways Co. v. Nelson, 116 Ill. App. 609, where the same objection was made as is interposed in this proceeding.

The remaining ground urged for reversal is that the verdict of the jury was excessive, and that improper elements of damage were submitted to the jury. Plaintiff was an employee of the Standard Live Stock Commission Company, as a steer salesman. Immediately after the accident he was taken to St. Joseph Hospital in Elgin, where he remained under a doctor's care for twenty-four hours and was given some medicine to ease his pains. Next morning ice packs were applied to his chest and he was bandaged with adhesive tape from the left side of his chest and around his back. The pain and soreness remained with him for many weeks, and after he returned home he was treated by Dr. John Davis for several weeks, who prescribed medicine to prevent coughing. For a long period of time it was difficult for him to walk without pain.

He could not make any quick moves, and the slightest jerk or jar caused severe pains in his chest. For about ten weeks after the accident he went to his office possibly five or six times, but could not drive his car and take care of his sales work until about the first of November. During the interim he employed one Mr. Mills to sell steers for him, to whom he paid $100 a week for five weeks, making a total of $500. Besides this item he was required to pay his hospital expenses, services of two physicians, X-ray pictures, which showed a transverse fracture of the sixth rib, and was in constant pain for a considerable time. All of these items were submitted to the jury, and properly so, and the verdict of $1,000 was under the circumstances not excessive.

We find no reason for reversal, and therefore the judgment of the circuit court is affirmed.

JUDGMENT AFFIRMED.

Scanlan and Sullivan, JJ., concur.

[illegible]

[illegible] after the incident he took [illegible] time, [illegible] work until [illegible] employed [illegible]

[illegible] this item be required [illegible] of the [illegible] fracture of [illegible] erable [illegible] properly so [illegible] not [illegible]

I find no reason [illegible] of the circuit court in affirming [illegible]

[illegible]

[illegible] and affirmed, [illegible].

40196

CLARA SKOLNIK,
Appellant,

v.

KATHERINE VERRAN et al.,
Defendants.

LOUIS D. GLANZ, successor trustee,
Appellee.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

297 I.A. 631

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

December 13, 1937, Clara Skolnik, plaintiff herein, filed her complaint in the circuit court seeking to foreclose the lien of a trust deed for the amount due upon a bond and extension interest coupon of which she was the owner. The proceeding filed by plaintiff was in effect a subordinate foreclosure, wherein she sought to foreclose the lien of the trust deed only in so far as the same secured her bond and the interest thereon, and was not intended to in any way impair the lien of the trust deed as to the security of other bonds described in and secured thereby. Subsequently, July 15, 1938, Louis D. Glanz, successor trustee under the trust deed sought to be foreclosed, moved to strike the complaint on the ground that prior to the filing of the instant proceeding, he, as trustee, had on October 15, 1937, filed a suit, also in the circuit court, on behalf of all the owners and holders of bonds and interest coupons described in and secured by said trust deed, and as their representative sought to foreclose the lien of the trust deed, and stating that the interest of plaintiff in this proceeding was amply protected by reason of that suit. The court sustained

the motion to strike and dismissed the complaint for want of equity, and this appeal by Clara Skolnik followed. The trustee, appellee herein, has filed no brief on appeal.

The sole question presented for determination is whether or not, under the provisions of the trust deed, plaintiff was entitled to file a separate foreclosure proceeding by which she sought to subordinate her interest to that of the other bondholders, without in any way impairing the lien of the trust deed for the security of the other bonds upon which foreclosure had been instituted by the trustee prior to this suit.

The provision of the trust deed upon which this suit is predicated is as follows: "The holder or holders of any one or more of said bonds and/or of the interest coupons evidencing the interest on any of said bonds, upon which default in payment has been made as herein provided, may (without declaring the whole of the principal sum, hereby secured, due and payable), file a bill in his or their name, to foreclose this indenture for the amount due upon any such interest coupons and/or bonds, or any of them, together with all advances made by the holder or holders of any such bonds, in the manner and to all intents and purposes as though such interest coupons and/or bonds were secured by a separate Trust Deed, provided, however, that any such foreclosure or foreclosures for the amount or amounts due upon any such interest coupons, and/or any such bonds and disbursements, as aforesaid, shall be in all respects secondary and subject to the continuing lien of this indenture for the security of all other bonds and interest coupons described in and secured hereby, and of all disbursements and advances which have been made or may thereafter be made under the provisions of this indenture, and any such partial foreclosure of this indenture shall operate to subordinate the lien and security of this indenture as to the holder or holders of the interest

coupons and/or bonds, for the payment of which such partial foreclosure is sought to the lien and security of the indenture in favor of the holder or holders of all other bonds and interest coupons outstanding hereunder.

"In case of the partial foreclosure of this Trust Deed, a reasonable sum may be allowed by the court as and for solicitors' fees of the complainant."

Under the foregoing provision plaintiff was authorized to file a partial foreclosure. Her counsel say that they have found no case passing upon the precise question. It seems to us, however, that since plaintiff is expressly authorized under the terms of the trust deed to file a foreclosure, by which she seeks to subordinate her bond so as to make it a second mortgage without impairing the lien of the trust deed for the security of other bonds, the chancellor erred in dismissing her suit. Plaintiff takes the position that she has a second mortgage on the property by reason of the subordination, and asks that her second mortgage be foreclosed, without impairing the rights of the bondholders in the prior suit. That the holder of a second mortgage may file a proceeding, notwithstanding the pendency of a first mortgage foreclosure, has never been seriously questioned, and since her suit cannot impair the lien of the first mortgage the mere pendency of a prior suit by the trustee acting on behalf of all the bondholders, should not bar the proceeding to which she was entitled under the terms of the trust deed. No decree had been entered, and until one is entered the holder of a bond has a right to regard his bond as secured by separate trust deed and foreclose it for his benefit, provided his complaint and his prayer for relief show that he seeks to foreclose only in so far as it secures his bond and that his foreclosure is subject to the continuing lien of the trust deed in so far as it secures the other outstanding bonds.

coupons and/or bonds, for the payment [illegible] foreclosure in connection to the lien and security [illegible] favor of the holder or holders of all coupon bonds and [illegible] coupons owned during [illegible].

"In case of a [illegible] form of [illegible], a reasonable sum may be allowed [illegible] fees of the complainant."

Under the foregoing provision of [illegible] filed a petition [illegible] no case pending upon the [illegible] foreclosure, however, [illegible] of the [illegible] foreclosure, [illegible] ordinance [illegible] putting the lien of the [illegible] the chancellor erred in [illegible] position that the [illegible] of the subordination, and [illegible] closed, without impairing the rights of [illegible] suit. That the holder of a second [illegible] motion regarding the [illegible] never been seriously [illegible] the lien of the first mortgage the more [illegible] by the trustee acting on behalf of all the [illegible] but the proceeding to which the [illegible] the trust deed. [illegible] entered the holders of [illegible] secured by separate trust deeds and [illegible] provided his complaint and his prayer for [illegible] seem to [illegible] his foreclosure is subject to the [illegible] deed in so far as it secures the other [illegible] bonds.

Counsel for plaintiff argue that the trustee should be the last person to complain about such proceedings, since a subordination of the lien of the bond sought to be foreclosed in the partial foreclosure increases the value of the security held by the other bondholders, and this point seems to us well taken. Neither the trustee nor the bondholders whom he represents are in any way injured. A party who suffers no injury ought not to be permitted to complain. (Central Trust Co. v. Calumet Co., 260 Ill. App. 410.)

We are of the opinion that the court erred in dismissing the complaint for want of equity, and the order or decree of the circuit court is therefore reversed.

REVERSED.

Scanlan and Sullivan, JJ., concur.

Counsel for plaintiff argues that the statute should be the last person to complain about such procedure, because subordination of the lien of the bond can lie to be foreclosed in the partial foreclosure increases the value of the property by the other bondholders, and this point seems to be well taken. Neither the trustee nor the bondholders when in controversy are in any way injured. A party who suffers no injury on it may not be permitted to complain. (Cornell Univ. Co. v. Cammer, 6 Cir., 200 Fed. 1p. 410.)

We are of the opinion that the court erred in dismissing the complaint for want of equity, and the order or decree of the circuit court is therefore reversed.

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Coghlan and Sullivan, JJ., concur.

40231

THE PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

v.

NICK VERGADO,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

297 I.A. 632

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Nick Vergado, defendant, sued out a writ of error to reverse a judgment of the municipal court adjudging him guilty of the offense of pandering and sentencing him to imprisonment in the House of Correction for a term of six months and to pay a fine of $300. The review is predicated upon the common law record only, and therefore no facts material to the issues involved appear of record or in controversy. The cause was heard by the court without a jury, and after the finding of guilty, motions for a new trial and in arrest of judgment, and also a motion to vacate the judgment, were entered and overruled by the court.

The information upon which Vergado was tried reads as follows: "Patrick Deeley, a resident of the City of Chicago, in the state aforesaid, in his own proper person, comes now here into court, and, in the name and by the authority of the People of the State of Illinois gives the Court to be informed and understand that Nick Vergado, the defendant, heretofore, to-wit, on the 29th day of November, A. D. 1937, at the City of Chicago aforesaid, did unlawfully, knowingly and wilfully

THE [illegible] IN [illegible]
[illegible]

Defendant in error,

v.

NICK V. [illegible],

Plaintiff in error.

MR. [illegible] DELIVERED THE OPINION OF THE COURT.

[illegible] reverse a judgment of the municipal court [illegible] of the offense of prostituting and [illegible] in the house of [illegible] a fine of $20. [illegible] record only, [illegible] involved [illegible] heard by the court [illegible] motions for [illegible] also motion to [illegible] ruled by the court.

The indictment [illegible] follows: [illegible] in the [illegible] more into [illegible] people of [illegible] and urdanet [illegible] county, on the [illegible] of [illegible]

procure a place in a certain house of prostitution located at address unknown street in the City of Chicago, Illinois, known to said Nick Vergado to be a house of prostitution, for Leona Brown a certain female person, by Nick Vergado to procure a place in a house of prostitution for a female person and so the defendant is guilty of pandering, contrary to the form of the statute in such case made and provided and against the peace and dignity of the People of the State of Illinois. In violation of Par. 475 of Chap. 38, Cahill R. S. 1921."

The sufficiency of the information was not challenged by motion to quash before trial. It is contended, however, that the information fails to charge the offense of pandering or any other criminal offense; that the defect is not merely one going to form, but is of such character that it cannot be said that it charges any crime whatsoever, and therefore the defect may be raised by motion in arrest of judgment or by writ of error. The material portion of the statute (chap. 38, sec. 170, Smith-Hurd Illinois Annotated Statutes, 1937) under which this prosecution was brought, reads as follows: "Any person who shall procure a female inmate for a house of prostitution or who, by promises, threats, violence or any device or scheme, shall cause, induce, persuade or encourage a female person to become an inmate of a house of prostitution, or shall procure a place as inmate in a house of prostitution for a female person *** shall be guilty of pandering ***."

The gravamen of defendant's contention is that the information fails to charge that he procured a place for a certain female person as "inmate" in a house of prostitution. It is argued that the statute does not denounce or forbid the "procuring of a place" in a house of prostitution for a female person as a

procure a place in a certain house of prostitution for a female to address unknown street in the city of Chicago, Illinois, knowing to said house to be a house of prostitution, for some Brown a certain female person, by that means to procure a place in a house of prostitution for a female person not to the said Brown in guilty of pandering, contrary to the form of the statute in such case made and provided and " in the same the peace of the People of the State of Illinois. In violation of sec. 1 of chap. 38, Ill. R. S. 1921."

The sufficiency of the information was not challenged by motion to quash before trial. It is contended, however, that the information fails to charge the offense of pandering, or any other criminal offense; that the defect is not merely one of form, but is of such character that it cannot be said that it charges any crime whatsoever, and therefore the defect may be raised by motion in arrest of judgment or by writ of error. The material portion of the statute (Chap. 38, Sec. 170, Ill. Rev. Stat. Illinois Annotated Statutes, 1927) under which this prosecution was brought, reads as follows: "Any person who shall procure a female inmate for a house of prostitution or who, by promises, threats, violence or any device or scheme, shall induce, persuade or encourage a female person to become an inmate of a house of prostitution, or who shall procure a female inmate for a house of prostitution for a female person who shall be guilty of pandering ***."

The gravamen of defendant's contention is that the information fails to charge that he procured a place for a female person as "inmate" in a house of prostitution. It is argued that the statute does not denounce or forbid the "procuring of a place" in a house of prostitution for a female person as a

crime, but forbids procuring a place as inmate in a house of prostitution for a female person. Vergado's counsel says that it is not a crime to procure a place for a female person in a house of prostitution as a waitress, chambermaid or pianist, and that under the information filed, proof that defendant procured a place in a house of prostitution for Leona Brown as a roomer, or as an interior decorator or in any other capacity except as an inmate is not within contemplation of the statute.

The statute upon which the case proceeded charges defendant "with unlawfully procuring a place in a house of prostitution for Leona Brown, a female person." It has been consistently held that the purpose of an information is to inform the defendant of the offense with which he is charged, and that an information is sufficient which states the offense plainly enough to be readily understood by the defendant, to enable him to properly prepare his defense. (People v. Donaldson, 341 Ill. 369; People v. Garfinkle, 169 Ill. App. 554.) We think the information was sufficient to state the offense charged in such plain language that it could be readily understood by the defendant and the court. In People v. Holtzman, 195 Ill. App. 53, and People v. Weber, 152 Ill. App. 102, it was held that an information need not use the very words of the statute creating the offense, but is sufficient if it employs words conveying the same meaning, and although inartistically drawn, if no motion to quash it or for a bill of particulars were made before trial, it is sufficient after verdict if it apprises the defendant of the crime with which he was charged. (People v. Garfinkle, 169 Ill. App. 554, 558.) In People v. DeMos, 173 Ill. App. 130, it was contended that the information did not allege that the female person was to remain there "as an inmate". The court held this to be a matter of form, and that in the absence of a motion to quash it was

crime, but forbids procuring a place as inmate in a house of prostitution for a female person. Vergado's counsel argues that it is not a crime to procure a place for a female person in a house of prostitution as a waitress, cashiewgirl or janitor, and that under the information filed, proof that defendant procured a place in a house of prostitution for Leona Brown as a roomer, or as an interior decorator or in any other capacity except as an inmate is not within contemplation of the statute.

The statute upon which the case proceeded charges defendant "with unlawfully procuring a place in a house of prostitution for Leona Brown, a female person." It has been consistently held that the purpose of an information is to inform the defendant of the offense with which he is charged, and that an information is sufficient which states the offense plainly enough to be readily understood by the defendant, to enable him to prepare his defense. (People v. Henderson, 261 Ill. 362; Wright v. Martinsby, 189 Ill. App. 584.) We think the information was sufficient to state the offense charged in such plain language as it could be readily understood by the defendant and the court. In People v. Holtzman, 189 Ill. App. 52, and People v. Epler, 222 Ill. App. 102, it was held that an information need not use the very words of the statute creating the offense, but is sufficient if equivalent words convaying the same meaning, and fairly drawn, if no motion to quash is or for a bill of particulars made before trial. It is sufficient after verdict if [illegible] the defendant of the crime with which he is charged. (People v. Kimmig, 189 Ill. App. 52, 61.) In People v. [illegible], 111 Ill. [illegible], 136, it was contended that the information did not allege that the female person was to remain under "an inmate." We cannot hold this to be a matter of form, and that in the absence of a motion to quash it was

too late to complain of the informality after trial.

Defendant relies on People v. Greenburg, 172 Ill. App. 300, wherein the court, in commenting upon the sufficiency of an information charging pandering, said: "We think that the gravamen of the offense *** is the causing, inducing, etc., a female person to become an inmate of a house of prostitution." The language used in the information at bar charging Vergado "with unlawfully procuring a place in a house of prostitution for Leona Brown, a female person," sufficiently states the gravamen of the offense, and in our opinion sufficiently meets the legal requirements.

Defendant did not preserve the record of proceedings at the trial and therefore it must be assumed that the evidence sustains the verdict.

The judgment of the municipal court should therefore be affirmed, and it is so ordered.

JUDGMENT AFFIRMED.

Scanlan and Sullivan, JJ., concur.

too late to complain of the information [illegible]

[illegible] motion on [illegible] [illegible] wherein the court, in [illegible] motion on [illegible] the offense [illegible] become an inmate of a house of [illegible] in the information at bar charging [illegible] a place in a house of [illegible] sufficiently [illegible] sufficiently meets the legal requirements.

Defendant did not preserve the record of proceedings [illegible] trial and therefore it must be assumed that the evidence [illegible] the verdict.

The judgment of the municipal court should therefore be affirmed, and it is so ordered.

JUDGMENT AFFIRMED.

Donlan and Sullivan, JJ., concur.

39988

FRED HOLY,
Appellee,

v.

WINIFRED HITCHCOCK,
also known as Winnie Hitchcock,
Appellant.

6A

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

297 I.A. 632

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This is an action brought by plaintiff, Fred Holy, against defendant, Winifred Hitchcock, to recover from the latter the reasonable value of legal services rendered by him as her attorney in the Circuit court of Cook county in the case entitled Wiley Hitchcock v. Winifred Hitchcock, No. 34-C-1431. Upon the verdict of a jury judgment was entered against defendant for $500 and this appeal followed.

One of the reasons advanced by defendant for the reversal of the judgment is that certain questions propounded by plaintiff's counsel to plaintiff and one of his witnesses and the answers thereto were of such a nature as to arouse the passions of the jurors and influence their minds against the defendant so that she was deprived of a fair and impartial trial. There is merit in this contention.

Judge Trude was the chancellor of the circuit court who tried the cause out of which plaintiff's claim for attorney's fees arose. The following is a portion of the direct examination of plaintiff in the instant case:

"Q. Well, to refresh your recollection, I will ask you whether or not he said this, 'I would say he has tried the case very fairly. There is only one Person that can satisfy you [referring to defendant] and He doesn't exist on this earth.'

"A. That is what Judge Trude said.

" ***

"Q. Now, I will ask you whether or not at the trial in open court already referred to Judge Trude did not further say this, directing his remarks to Mrs. Hitchcock, 'You sit down and keep quiet or you can go to jail. You can go to jail for thirty days.'

"Mr. Schechter: I object to the question.

"The court: Objection sustained."

Although defendant's objection was sustained to the question last above quoted, it was heard by the jury and its purport was of such a character that it could hardly fail to leave the impression that the defendant was guilty of unlawful conduct and to degrade and humiliate her in the eyes of the jury. This question with its imputations must have been further impressed upon the jury by the following answer given by Judge Trude on direct examination when he was called as a witness in plaintiff's behalf:

"She and her husband had come to the parting of the ways apparently and she insisted at all times in open court when the case was being tried in interrupting the attorney and making suggestions to him and in constant bickering, and even with the Court, and I could have fined her - I would have been justified in fining her many times during the trial of the case; but it isn't my policy to do so unless it is absolutely necessary *** ."

It is difficult to perceive what bearing the conduct of defendant in the circuit court case, in which the services of plaintiff were rendered, could have upon the question of the value of such services. Judge Trude's stricture in that case that the Deity was the "only one Person that can satisfy you," [referring to defendant] as well as his admonition to her during the trial of that cause to "sit down and keep quiet or you can go to jail" and that "you can go to jail for thirty days," as incorporated in the questions propounded in this cause to plaintiff, in our opinion, could only have been intended to prejudice the minds of the jurors against defendant. The material issue in the case at bar was not whether

"A. That is what Judge stated to me.

"[illegible]

"[illegible] Yes, I'll ask you [illegible] or not [illegible] open court already [illegible] to Judge [illegible] thing, did [illegible] to [illegible] keep quiet or you [illegible] to jail. You [illegible] days.'

"Mr. [illegible]: I object [illegible] question.

"The court: [illegible] overruled.

Although [illegible] the [illegible] on the [illegible] last above quoted, it was [illegible] by the jury as [illegible] such a character [illegible] court. [illegible] to leave [illegible] that the defendant [illegible] of unlawful [illegible] and humiliate her in the eyes of the jury. The [illegible] imputations must have been [illegible] the jury by the following answer given by Judge [illegible] he was called as a witness in [illegible] behalf:

"The one [illegible] apparently [illegible] case was being tried in [illegible] [illegible] court, and [illegible] in [illegible] isn't my policy to [illegible]."

It is difficult to perceive [illegible] defendant in the circumstances in which [illegible] were rendered, could have [illegible] receives. Judge [illegible] the "only one [illegible]" [illegible] as well as his admonition [illegible] "sit down and keep quiet or you can go to jail" [illegible] to jail for thirty days." [illegible] proponed in [illegible], in our opinion, could only have been intended to prejudice the minds of the jurors against defendant. The material in [illegible] not [illegible]

defendant was obstreperous or cantankerous during the trial of the circuit court case but was rather the value of the legal services rendered her therein by plaintiff as determined principally by the nature, character and extent of such services. What we have just stated applies with even greater force to the testimony elicited from Judge Trude that "I could have fined her - I would have been justified in fining her many times during the trial of the case *** but it isn't my policy to do so unless it is absolutely necessary." This testimony coming from a judge of the circuit court had the effect of branding the defendant as a perverse and well nigh incorrigible woman and may well have led the jury to feel that it was its duty to punish her, at least to some extent, for her contumacy.

It has been held repeatedly held that where during the trial of a cause there were such persistent efforts on the part of plaintiff's counsel to appeal to the passion and prejudice of the jury as cannot be reconciled with any other intent than to arouse the passion of the jury and inflame their minds against the defendant, the judgment entered on the verdict for the plaintiff should be reversed unless it can be seen that counsel's improper conduct did not result in injury to defendant. We are constrained to hold that the questions asked the witnesses and the answers made to same as heretofore set forth, were calculated, whether so intended or not, to prejudice the jurors against the defendant. As to the foregoing question to which objection was sustained by the court, the mere fact that the court did sustain the objection did not necessarily undo the harm. Any undue and improper advantage gained by such improper questions and answers, if such advantage is apparent or fairly inferable, may justify a reversal of the judgment on the ground that a fair trial has not been had. (Libby, McNeil & Libby v. Cook, 123 Ill. App. 574.)

defendant [illegible] of improper [illegible] the words of the [illegible] sound [illegible] the value [illegible] serve a purpose for [illegible] principally [illegible] the manner, [illegible] vices. [illegible] even if [illegible] to the [illegible] fined nor - I would [illegible] during the trial of [illegible] unless it is [illegible] a judge of the [illegible] defendant as a pervert and [illegible] well have led the jury [illegible] at least to some extent, [illegible].

It has been held repeatedly that [illegible] trial of a crime there was [illegible] of [illegible] of plaintiff's counsel [illegible] of the jury [illegible] them to arouse the passion of the jury [illegible] against the defendant, the jury [illegible] plaintiff should be reversed [illegible] improper conduct did not result in injury to [illegible] considered [illegible] answers made to [illegible] rather to intimidate or hurt, to [illegible] found it [illegible] to the [illegible] in taking by the [illegible] the objection [illegible] to the [illegible] improper [illegible] it [illegible] reversal of the judgment [illegible] not been made. (Libby, McNeill & Libby v. [illegible], [illegible])

In the circuit court proceeding wherein the defendant here and her estranged husband were litigating the ownership of certain funds, plaintiff in the instant case was permitted to file an intervening petition against Mrs. Hitchcock claiming attorney's fees for his services in that cause. After a hearing the chancellor allowed him $100 attorney's fees and included in the final decree of the court a judgment for that amount against defendant. Mrs. Hitchcock appealed from both the main decree and the judgment against her contained therein allowing plaintiff the $100 attorney's fees on his intervening petition. This court affirmed the main decree but reversed the judgment against defendant for the attorney's fees on the ground that the chancellor was without jurisdiction to enter same in that cause.

Defendant urges that under either the doctrine of res judicata or estoppel by verdict plaintiff is barred from maintaining this action because of the order allowing plaintiff attorney's fees entered by the circuit court and the decision of this court on her appeal from said order. This contention is without merit. The question of plaintiff's right to recover fees for the legal services rendered by him to defendant in that cause was left unadjudicated and the parties are in the same position as they were before the void allowance of attorney's fees in the decree subsequently vacated by the reversal of such allowance by this court for lack of jurisdiction of the circuit court to enter such judgment order.

Inasmuch as this case will in all likelihood be retried, we refrain from discussing the evidence. Since other questions raised as to the improper admission and exclusion of evidence have been either covered by what has already been said or the errors claimed in connection therewith are of such a nature that they are not likely to recur on the retrial of this cause, we deem further discussion unnecessary.

In the circuit court proceeding wherein the defendant here and her estranged husband were litigating the ownership of certain funds, plaintiff in the instant case was permitted to file an intervening petition against Mrs. Hitchcock claiming such fees for his services in that cause. After a hearing the chancellor allowed him $100 attorney's fee and included in the final decree of the court a judgment for that amount against defendant. Mrs. Hitchcock appealed from both the main decree and the judgment against her contained therein allowing plaintiff the $100 attorney's fee on his intervening petition. The court affirmed the main decree but reversed the judgment against defendant for the attorney's fee on the ground that the chancellor was without jurisdiction to enter same in that cause.

Defendant urges that under either the doctrine of res judicata or estoppel by verdict plaintiff is barred from maintaining this action because of the order allowing plaintiff attorney's fees entered by the circuit court in the dissolution of this court in her appeal from said order. This contention is without merit. The question of plaintiff's right to recover fees for the legal services rendered by him in a proceeding in that court is a fact unadjudicated and the parties are in the same position as they were before the void allowance of attorney's fees in the decree mentioned, entered by the reversal of such allowance by the court for lack of jurisdiction of the circuit court to enter such judgment order.

Inasmuch as this case will in all likelihood be retried, we refrain from discussing the evidence. Some other questions raised as to the improper admission and exclusion of evidence have been either waived or not properly presented to the circuit court. We find in the record nothing that in connection therewith are of such a nature that they are not likely to arise on the retrial of this cause, so we deem further discussion unnecessary.

It has been pointed out that this case has been tried twice in the court below with the same result, but that fact in itself is insufficient reason why defendant should be deprived of the fair and impartial trial she is entitled to under the law.

For the reasons stated herein we feel that the ends of justice will be best served by a retrial of this case. The judgment of the municipal court is therefore reversed and the cause remanded.

JUDGMENT REVERSED AND CAUSE REMANDED.

Friend, P. J., and Scanlan, J., concur.

It has been [illegible]

tice in the court below with the same [illegible]

in itself is inadmissible reason why a [illegible]

deprived of the right one has [illegible]

under the law.

For the reasons [illegible]

justice will be best served [illegible]

judgment of the municipal court [illegible]

cause remanded.

[illegible]

Friend, P. J., and Beamish, J., concur.

40143

MRS. WILLIAM FLUEGGE,
Appellee,

v.

DES PLAINES & COOK COUNTY FARMERS MUTUAL FIRE INSURANCE COMPANY OF MT. PROSPECT, ILLINOIS, a corporation, now doing business under the name and style of Mutual County Fire Insurance Company of Mount Prospect, Illinois, a corporation,
Appellant.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

297 I.A. 632

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant insurance company from a judgment for $1,563.85, rendered against it in an action brought by plaintiff, Mrs. Wm. Fluegge, to recover on an insurance policy issued to her by defendant for a loss of property occasioned by fire. By agreement of the parties the issues were submitted to the court without a jury on a stipulation of facts.

As to the pertinent facts involved it was stipulated that the defendant corporation is a county mutual fire insurance company "operating under and regulated by a certain Statute of the State of Illinois, known as 'An Act to Organize and Regulate County Fire Insurance Companies,' in force July 1, 1877;" that on October 9, 1935, defendant issued and delivered to plaintiff its policy of fire insurance; that at the time of applying for said policy plaintiff paid a cash premium of $7.42 and delivered to defendant her premium note for $371; that the defendant has and retains said note and has at no time offered to deliver same up and cancel it; that on October 3, 1936, the Board of Directors

of defendant company made a valid, authorized and reasonable assessment against all policyholders of 3% of the obligations of said policyholders, plaintiff's obligation being $371, as evidenced by the aforesaid note; and that defendant, in accordance with said assessment and in accordance with the provisions of the statute and section 14 of its by-laws, which were set forth in plaintiff's policy, caused to be mailed to plaintiff a notice that an assessment was due from plaintiff within thirty days in the amount of 3% on plaintiff's obligation.

Section 14 of the by-laws printed on the policy attached to the complaint and made a part thereof is as follows:

"In case of loss, all notices for assessments shall be sent to the respective parties by letter and payment must be made within 30 days of receipt of such notice, and may be made to any director or the secretary of the company. If assessments are not paid within 30 days, then ten per cent penalty shall attach to said assessment. In the event of the refusal or neglect of the parties or either of them to pay the amount as assessed against them, for a period exceeding two months from the date of notice to the effect that same is due and payable, the amount so due may then be collected, as shall be directed by this company, at the expense of such delinquent party; and in the event the assured fails or refuses to pay the assessment as assessed against him or her, as the case may be, within the time in this section specified, then and in such event the policy of such assured shall cease to be in force and effect but shall be considered null and void during the time such assessment remains unpaid."

It was further stipulated that in January, 1937, a second notice of said assessment was mailed to plaintiff and that plaintiff failed to pay the amount of said assessment; that on April 9, 1937, plaintiff received a further demand for payment of said assessment; that plaintiff never received a notice either orally or in writing that her policy had been cancelled; that "on or about the 16th of June, 1937, Wm. F. Winkelman, one of the members of the Board of Directors of defendant company, called upon plaintiff at her home and requested her to make payment to him for said company in the sum of $11.70 in payment of said assessment ***, and that the plain-

of defendant, [illegible] by mere [illegible], [illegible] on the assessment against all policyholders of [illegible] of the [illegible] paid policyholders, plaintiff's obligation [illegible]. The evidence by the [illegible] note: [illegible] assessment [illegible] with the assessment [illegible] in [illegible] the provision of the [illegible] and section 1[illegible] of its by-laws, [illegible] to [illegible] policy, caused [illegible] was due from [illegible] the [illegible] of plaintiff's obligation.

Section [illegible] of the [illegible] provides [illegible] to the [illegible]

> "In case of loss, [illegible] assessments shall be sent to the [illegible] by [illegible] made within [illegible] days [illegible] to any [illegible] are not paid within 60 days, [illegible] attach to [illegible] assessment. In the [illegible] of [illegible] assessed against [illegible] the date of notice [illegible] the amount [illegible] this company, [illegible] the event the [illegible] assessed against him or her, [illegible] in this section [illegible] such assessment [illegible] considered [illegible] unpaid."

In an [illegible] dated [illegible], 1[illegible], [illegible] notice of said [illegible] [illegible] failed to [illegible] the [illegible] plaintiff [illegible] that plaintiff never [illegible] that her policy [illegible] June, 1[illegible], [illegible] one of the [illegible] director of [illegible] and [illegible] sum of $1,70 in payment of said [illegible] the plain-

tiff at said time told the said Wm. F. Winkelman that she would pay said assessment in the near future and that she did not desire her policy *** to be cancelled, and that the said Wm. F. Winkelman then stated to the plaintiff that she need not worry that her policy was not cancelled and would not be if she paid the premium at a later date, especially in view of the fact that the plaintiff and her deceased husband had been members of the defendant company for over sixteen years;" that on June 20, 1937, a portion of the articles and property insured by said policy was destroyed by fire to the extent of $1,563.85; that the defendant waived notice and written proofs of loss and ownership; and that at the time of the occurrence of the fire said assessment was not paid and remains unpaid.

Defendant contends that "at the time of the fire, the policy was not in force, inasmuch as Section 14, aforesaid, of the By-Laws (printed on the policy attached to the Complaint and made a part thereof) specifically provides that during such time as an assessment remains unpaid, the policy shall cease to be in force and effect; that this is true regardless of whether or not a cancellation of said policy was legally effected under other provisions of the policy relating to cancellation; that by the provisions of said Section 14, there is a suspension of the risk during such time as assessments are unpaid as distinguished from a forfeiture or cancellation of the policy."

Plaintiff's theory is that her policy of insurance was in full force and effect since it had never been legally cancelled.

The vital question presented for our determination is whether or not plaintiff having failed to pay the valid assessment, notice of which was mailed to her on three different occasions, is barred from recovery under the provisions of section 14 of defend-

[illegible] pay [illegible] as [illegible] in the [illegible] not [illegible] her policy was to be cancelled, [illegible] then [illegible] was not [illegible] later date, [illegible] her decease [illegible] over [illegible] artificial [illegible] to the extent of [illegible] written proof of loss and [illegible] occurrence of the [illegible] unpaid.

Referring contention that [illegible] the policy was not in force, [illegible] the Ky-Dura (printed on the policy [illegible] made a part thereof) [illegible] as an assessment [illegible] force and effect; [illegible] a cancellation of said policy [illegible] provisions of the policy [illegible] provisions of said section [illegible] during such time [illegible] forfeiture or modification of [illegible]."

Finally [illegible] [illegible] full force and effect since [illegible].

The vital question presented [illegible] whether or not plaintiff having failed [illegible] notice of lapse as mailed to her [illegible] barred from recovery under the provisions of section [illegible] of [illegible]

ant's by-laws, heretofore set forth, regardless of whether the policy was cancelled.

It is unnecessary to discuss plaintiff's position at length. She urges that she is entitled to recover on the policy because same was not legally cancelled. Defendant agrees that the policy was not cancelled. Plaintiff claims that the company by its conduct waived its right to forfeit or cancel the policy. The doctrine of waiver is inapplicable because no attempt was made by defendant to forfeit the policy and in any event plaintiff never paid the delinquent assessment. Plaintiff insists that the provision contained in the aforesaid section 14 that "in the event the assured fails or refuses to pay the assessment as assessed against him or her, as the case may be, within the time in this section specified, then in such event the policy of such assured shall cease to be in force and effect but shall be considered null and void during the time such assessment remains unpaid," was not self executing and was, therefore, ineffective to suspend the insurance without notice to her that her insurance was suspended. It has been generally held that, while notice to an insured of the cancellation of an insurance policy is necessary where a cancellation is to be effected, notice of the legal effect of a suspension of risk provision in a policy is not required. Since the question of cancellation is not involved in this case, there is no necessity for further discussion of principles of law applicable to that question.

Defendant was a mutual insurance company and the valid assessment levied by it October 3, 1936, of which plaintiff had proper notice, was never paid by her. Section 14 of defendant's by-laws, made a part of the insurance policy issued to plaintiff, provides that during the period of nonpayment of an assessment the risk is suspended as distinguished from a cancellation of

ant's by-laws, heretofore set forth, regardless of whether the policy was cancelled.

It is unnecessary to discuss plaintiff's position at length. She urges that she is entitled to recover on the policy because same was not legally cancelled. Defendant argues that the policy was not cancelled. Plaintiff claims that the company by its conduct waived its right to forfeit or cancel the policy. The doctrine of waiver is inapplicable because no attempt was made by defendant to forfeit the policy and in any event plaintiff never paid the delinquent assessment. Plaintiff that is that the provision contained in the aforesaid section 14 that "in the event the assured fails or refuses to pay the assessment or assessed against him or her, as the case may be, within the time in this section specified, then in such event the policy of such assured shall cease to be in force and effect but shall be considered null and void during the time such assessment remains unpaid," was not self executing and was, therefore, ineffective to suspend the insurance without notice to her that her insurance was suspended. It has been generally held that, while notice to an insured of the cancellation of an insurance policy is necessary where such action is to be effected, notice of the legal effect of a suspension of risk provision in a policy is not required. Since the question of cancellation is not involved in this case, there is no necessity for further discussion of principles of law applicable to that question.

Defendant was a mutual insurance company and the valid assessment levied by it October 3, 1932, of which plaintiff had proper notice, was never paid by her. Section 14 of defendant's by-laws, made a part of the insurance policy issued to plaintiff, provides that during the period of nonpayment of an assessment the risk is suspended as distinguished from a cancellation of

the policy or the forfeiture thereof. The law is well settled that such a provision of non-liability, while an assessment is in default, is valid and binding on the insured.

In Tedrick v. Vandalia Mutual County Fire Ins. Co., 206 Ill. App. 299, where the policy under consideration contained a provision similar to that relied upon by defendant here, the court said at pp. 301-302:

"The policy provides: 'In case the assured fails to pay his assessments by the time specified, then this policy shall cease to be in force and remains null and void during the time such assessment remains due and unpaid.' August 21, 1914, a barn and some hay covered by the policy were destroyed by fire. Proof of the loss was made but the company refused to pay and suit was brought on the policy.

"The defense relied upon was that before the fire the directors had made an assessment which became due August 15, 1914, and that, though plaintiff in error had been notified of this assessment, he had failed to pay it, and in consequence the policy had ceased to be in force and was null and void at the time of the fire. ***

"As plaintiff in error failed to make payment of the assessment within the time prescribed, then, if the action of the directors in making the assessment was authorized by law, it is clear he could not recover. Farmers' Mutual Fire Ins. Co. of Palmyra v. Knight, 162 Ill. 470."

In Jones v. Aetna Insurance Co., 226 Ill. App. 160, in an action upon a policy of insurance which contained a suspension clause, the court said:

"It will be observed that under the terms of the contract the policy and all rights thereunder were to be suspended and appellee was not to be liable for loss or damage occurring while appellant was in default in payment of his note. A portion of the insured property was destroyed by fire on March 7, 1918, while the note was past due and unpaid.

"Appellant sued appellee to recover the amount of his loss and at the close of his evidence the court directed and the jury returned a verdict in favor of appellee. Judgment was rendered on the verdict and an appeal taken to this court.

"The law is well settled that such a provision as the one contained in this contract of insurance is valid and binding on the insured. Carlock v. Phoenix Ins. Co., 58 Ill. App. 283, affirmed in 138 Ill. 210; Lenz v. German Fire Ins. Co., 74 Ill. App. 341; Robinson v. Continental Ins. Co., 76 Mich. 641, 6 L. R. A. 95; Continental Ins. Co. of New York v. Stratton, 185 Ky. 523, 215 S. W. 416; Dale v. Continental Ins. Co., 95 Tenn. 38, 31 S. W. 266; Hale v. Michigan Farmers' Mut. Fire Ins. Co.,

the policy or the furnishing thereof. [illegible]

that such a provision or [illegible] is

in dispute, is valid and binding on the [illegible].

In Tedrick v. Vandalia Insur. [illegible], 206

Ill. App. 299, where the policy [illegible]

provision similar to that [illegible], the

court said at pp. 301-302:

"The policy provides: 'In [illegible] pay his assessments by the time specified, then this policy shall cease to be in force and non [illegible] the time mentioned for payment [illegible] 1914, a burn and more than [illegible] by fire. Proof of the loss was made [illegible] pay said suit was brought on the policy.

"The defense relied upon [illegible] directors had made an assessment [illegible] 1914, and that, though plaintiff in error [illegible] this assessment, he had failed to pay it, [illegible] the policy had ceased to be in force [illegible] the time of the fire. * *

"As plaintiff in error had failed to make payment of the assessment within the time prescribed, [illegible] the directors [illegible] it is clear he could not recover. [illegible] Co. of Albany v. Philbin, 1 Ill. App. [illegible]."

In James v. [illegible], 280 Ill. [illegible], 16, in

an action upon a policy of insurance which contained [illegible] clause, the court said:

"It will be observed that under the terms of the contract the policy and all its provisions [illegible] and applicable for loss or damage occurring while appellant was in default in payment of his [illegible] the insured property [illegible] while the notes [illegible] unpaid.

"Appellant cited [illegible] Insur. Co. v. [illegible] Ins. Co. and of the close of [illegible] and the they remained [illegible] on the appeal [illegible] to this court."

"The [illegible] provision [illegible] contained in [illegible] on the insured. [illegible] v. Phoenix Ins. Co., [illegible] affirmed in 16 Ill. App. [illegible] v. [illegible] Ins. Co., [illegible] App. 241; Dohman v. [illegible] Ins. Co., [illegible] 1. [illegible] Ins. Co., 229, 16 [illegible] v. Phoenix Mutual [illegible] 39, 31 [illegible] v. [illegible] Ins. Co. [illegible]

148 Mich. 454, 111 N. W. 1068; Thompson v. Knickerbocker Life Ins. Co., 104 U. S. 252, 26 L. Ed. 765. See also 14 R. C. L. 977."

The validity of suspension of risk provisions in insurance policies such as that involved here is recognized in Couch Cyclopedia of Insurance Law, where it is said in vol. 3, sec. 628, p. 2023:

"The risk is, under many contracts of insurance, merely suspended by nonpayment of the premiums or assessments when due, in which case it is subject to revival on compliance with certain conditions, or absolutely on payment. In other words, a contract of insurance may be so expressly or impliedly conditioned that nonpayment of a premium or assessment merely operates to suspend the protection afforded by the policy or certificate for such period as the insured remains delinquent or in default. This means that, if there be a loss during the suspension, the insurance cannot be recovered."

According to the foregoing authorities and the cases cited therein, it seems to be the established rule that under a suspension clause in an insurance policy of this character the insurance is merely suspended while the assessment remains unpaid. The insured in the case at bar could have paid her assessment and the insurer must have accepted it, thereby reviving the policy from the time payment of the assessment was made, but since the loss occurred while the insured was in default, she cannot recover. It follows that by plaintiff's failure to pay the valid assessment levied against her, she elected to carry the risk herself of loss or damage to her property by fire until such time as she saw fit to revive the policy by payment of such assessment.

Other points have been urged and considered, but in the view we take of this cause we deem further discussion unnecessary.

For the reasons stated herein the judgment of the circuit court is reversed and judgment entered here in favor of defendant and against plaintiff.

REVERSED AND JUDGMENT HERE.

Friend, P. J., and Scanlan, J., concur.

Ins Mich. 424, 111 N. [illegible] 1068; Dickerson v. Bankers Reserve Life Ins. Co., Ind. [illegible] 26 N. [illegible] 72 [illegible] 277."

The validity or invalidity of such provisions [illegible] policies such as that involved here is recognized in second Restatement of Insurance Law, where it is said in vol. [illegible], sec. [illegible], p. [illegible]:

"The mere fact, under many conditions of insurance, merely suspended by non-payment of the premium [illegible] in which case it is subject to revival on compliance with certain conditions, or terminated on payment. In other words, a contract of insurance may be so expressly or impliedly [illegible] nonpayment of a premium or [illegible] upon the [illegible] the protection afforded by the policy or certificate for [illegible] period as is included within the definition of insurance. When means the [illegible] if there be a loss. [illegible] the insurance cannot be recovered."

According to the [illegible] thereon, [illegible] be the [illegible] clause in an insurance policy of this character [illegible] merely suspended while [illegible] in the [illegible] must have accepted it, [illegible] payment of the [illegible] the insured [illegible] plaintiff [illegible] she [illegible] properly by fire [illegible] by payment of such [illegible].

Other points have [illegible] the take of this [illegible] only.

For the reasons [illegible] court is reversed and [illegible] and [illegible] plaintiff.

[illegible]

Friend, J., and Gemmill, J., concur.

39634

HARRY GOLD and L. I. SCHURMAN, et al.,	)	INTERLOCUTORY APPEAL
Appellees,	)	FROM SUPERIOR COURT
v.	)	COOK COUNTY.
METROPOLITAN TRUST COMPANY, a corporation,	)	
Appellant.	)	29 Ill. App. 3d 324

MR. PRESIDING JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

By order of court, this cause was consolidated with case No. 39863, in this court for the hearing. All the issues in the case are discussed and determined in the opinion filed in case No. 39863.

Our opinion is that the temporary injunction was improvidently granted, but in view of the fact that the bill was dismissed and the injunction dissolved by the trial court, there remains nothing for us to pass upon. Therefore, the appeal is dismissed.

APPEAL DISMISSED.

HEBEL AND DENIS E. SULLIVAN, JJ. CONCUR.

HENRY [illegible] et al.,

State N.

v.

MAT-COCOLIT [illegible] corporation.

Petition.

[illegible]

[illegible]

[illegible]

No. 39654, in this court [illegible]. [illegible] case are dismissed [illegible] 39654.

Our opinion is [illegible] identify [illegible], but in view of the [illegible] and the injunction dissolved by the trial court, [illegible] nothing for us to pass upon. Therefore, the [illegible] affirmed.

[illegible]

REHEARING DENIED [illegible].

39771

GEORGE F. KELLER, Plaintiff below, Appellee, v. ADAM J. ENSINGER, et al., Defendants below, On Appeal of MARION ENSINGER, et al., Appellants.	APPEAL FROM SUPERIOR COURT COOK COUNTY.
OSCAR NELSON, et al., Intervening Petitioners below, Appellees.	297 I.A. 633

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

On February 14, 1933, George F. Keller filed a creditor's bill in the Superior Court of Cook County against Adam J. Ensinger, Loretta F. Ensinger and Doris Travis, in which it is alleged that the plaintiff is the owner of an unsatisfied judgment against Adam J. Ensinger in the sum of $165.22. By this bill Keller sought to reach certain assets of Adam J. Ensinger. It is charged that Ensinger is the owner of, or is beneficially interested in real estate situated in the Village of Riverside, Illinois, and in other real estate which will be hereinafter referred to, and that his wife, Loretta F. Ensinger and one Doris Travis held these properties, and that transfers of the same by Ensinger were made for the purpose of placing the same beyond the reach of plaintiff's judgment. By the prayer in his complaint, plaintiff asked for a full and complete discovery of all property of Ensinger, either held by him, or in which he had a beneficial interest, and whether the same was held by Loretta F. Ensinger and Doris Travis, or by some other person.

Thereafter, on July 25, 1933, by leave of court and without objection, Oscar Nelson filed an intervening petition in the cause in which it is recited that at the July term, 1933, of the Superior Court of Cook County, the intervenor had recovered a judgment against

Adam J. Ensinger and Loretta F. Ensinger on certain notes for the sum of $3,207.50; that execution on such judgment had been issued and returned nulla bona, and the charge was made that Adam J. and Loretta F. Ensinger had conveyed and concealed their property, both real and personal, for the purpose of avoiding payment of this judgment. This petition also prayed for a full and complete discovery of all property of Ensinger, whether held by him in person, or property in which he had a beneficial interest, and of all property which might be held by other persons for or on his behalf. The matter involved in this petition is included in the supplemental petition hereinafter referred to, filed by William L. O'Connell, receiver.

Thereafter, Frank Sampson, as receiver, and one Isadore E. Kastel filed a further intervening petition in the cause, by leave of court and without objection, in which they alleged that in a suit by Kastel against the Berwyn State Bank, brought for the purpose of enforcing a superadded liability of the stockholders of that bank for the debts of the bank, a decree was entered against Loretta F. Ensinger on January 24, 1936, for the sum of $1,000.00 and costs of suit. On March 19, 1934, a supplemental intervening petition was filed by leave of court and without objection, by William L. O'Connell, as receiver of the Berwyn State Bank, and others representing the Berwyn State bank, in which it is charged, inter alia, that Adam J. Ensinger and Loretta F. Ensinger were indebted to them as such receivers, in the sum of $8,750.36, by reason of a deficiency decree entered on December 8, 1933, in a suit brought by plaintiff to foreclose a trust deed secured by certain property of the Ensingers, hereinafter referred to as the Aikenside Road property in Riverside, Illinois. In the last two intervening petitions the same charges of fraud are made and the same character of relief and accounting are asked as in the first intervening

[illegible]

[illegible] of [illegible]; what exactly [illegible]

and returned [illegible] [illegible]

Loretta [illegible] [illegible]

real and [illegible] 1, the [illegible]

ment. This [illegible]

of all [illegible]

property is [illegible]

which might be held by other [illegible]

matter involved in this [illegible]

petition [illegible]

receiver.

Thereafter, [illegible]

1. Kastel filed a [illegible]

leave of court and without objection, in [illegible]

a suit by Kastel against the [illegible]

purpose of enforcing a [illegible]

that bank for the debts [illegible]

Loretta v. Kuhlmeyer on January [illegible]

and costs of suit. [illegible]

petition was filed on [illegible]

William v. O'Connell, [illegible]

others [illegible]

later [illegible]

[illegible]

[illegible]

brought by plaintiff to [illegible]

property of the Kuhlmeyers, [illegible]

[illegible] property in [illegible]

petitions the same [illegible]

of relief and [illegible]

petition and in the original complaint. In each of the intervening petitions it is recited that execution had been issued on the judgments mentioned, that each had been returned no property found, and that the defendants had conveyed and concealed their property for the purpose of defrauding their creditors, including the petitioners. Answers were filed by the various persons to whom, the petition recites, the unlawful conveyances had been made, and by Adam J. Ensinger, Loretta F. Ensinger and Marion Ensinger, in which they each and all deny that any of the alleged conveyances of their various properties were made for the purpose of defrauding creditors, admitting that transfers of defendant's properties had been made to the Oak Park Trust & Savings Bank, as alleged and claiming that the purpose of such transfer was to create a trust fund for Marion Ensinger, daughter of the Ensingers, to whom they were indebted. Doris Travis, one of the defendants, was defaulted.

The various petitions and intervening petitions, together with the answers thereto, were referred to a Master in Chancery to take proofs and make a report to the court. After taking a large amount of testimony, the record indicates that the Master made a report containing a finding of the facts, together with a recommendation, to which detailed objections were made. The evidence of various witnesses and certain documents appear in the abstract under the heading, "Transcript of Evidence." The Master's findings and report were approved by the court, and the findings of fact as made by the Master are included in the decree. The facts, as found by the Master and by the court in its decree, are not questioned, therefore, we will assume that they are correct. In passing, it is to be noted, that there was a hearing before the court on the report of the Master, or special commissioner, as he is termed, together with the exceptions thereto, which exceptions were overruled. The findings of the court are first to the effect that the judgments against the

petition and in the original complaint. [illegible] in petition it is recited that [illegible] monts mortgage, [illegible] that the [illegible] the purpose of defrauding their creditors, [illegible] Answers were filed by the [illegible] testimony, the evidence convey no [illegible] banker, [illegible] each and all deny that [illegible] various [illegible] admission that [illegible] the Oak [illegible] such transfer was to create a trust [illegible] daughter of the bankrupt, [illegible] one of the defendants.

claiming

The various pleadings and [illegible] with the answers the case, some [illegible] take [illegible] amount of testimony, the record indicates that [illegible] record contains [illegible] tion, to which detailed objections were made. [illegible] various witnesses and certain [illegible] the decision, [illegible] report were [illegible] by the court, [illegible] by the [illegible] the master and by the court [illegible] fore, we will [illegible] be noted, [illegible] the master, or special commissioner, [illegible] the exceptions the [illegible] of the court are first to the effect [illegible]

parties were entered, that executions were issued and demands made thereon, and that all the executions were returned unsatisfied, as alleged in the original complaint and the intervening petitions.

The court then found that Adam J. and Loretta F. Ensinger had acquired certain property located at 3303-5 Grove Avenue, Berwyn, Illinois, which they later improved with a building containing four apartments and two stores, and that they placed a mortgage thereon for $10,000, which was released March 27, 1927; that at the time of the erection of the building, Mrs. Ensinger went to her mother, Mary Ann Leverenz, and told her that she needed $5,000 to complete the building; that her mother delivered to her $5,000, stating, "Well, Laura, we will give Marion [daughter of Loretta] the money and you can invest the money;" that Marion was 12 years old at the time of the delivery of the money, that Loretta F. and Adam J. Ensinger gave a receipt for it; that the larger part of the $5,000 was used in completing the building at 3303-5 Grove Avenue; that about May 7, 1928, Adam J. and Loretta F. Ensinger bought 125 feet on Grove Avenue across the street from the Grove Avenue property before mentioned, known as the McGuire property, and that Loretta F. Ensinger requested and received from her mother $3,000 to use in the purchase, and gave a receipt therefor; that by the receipt of the two items of $5,000 and $3,000, Adam J. and Loretta F. Ensinger became indebted in these amounts, plus interest, according to the terms of the receipts; that Loretta F. Ensinger testified that when Marion was born, she started saving $3.00 per week, and in 1921, at the end of 468 weeks, she had accumulated $1,404.00, at which time she invested $900.00 of said funds in property on Greenwood Avenue, Berwyn, which was sold for $2,650.00 in 1925; that the residue amounting to $504.00, plus $312.00 accumulated at $3.00 per week in 1921, 1922 and 1923, plus $2,650.00 amounted to $3,460.00; that in 1923 and 1924 she

[illegible]

accumulated another $156.00, making a total of $3,622.00; that in 1923 she bought some Oak Park Avenue lots for $1500.00, leaving on hand $2,122.00; that she sold said lots at a profit of $750.00, and the account then amounted to $4,372.00; that in 1924 she bought 3303-5 Grove Avenue, using $3,000 in cash from said fund to pay various contractors; that in 1925, 1926, 1927 and 1928 she accumulated an additional $624.00 in savings, making $1,996.00 cash on hand; that in 1928, Marion loaned her mother $100.00 which had been given to Marion as a birthday present by her grandmother; that in 1928, $2,000.00 of said funds was invested in what is described as the McGuire properties, leaving a cash balance of $96.00; that when Loretta Ensinger moved to Riverside, she laid aside an estimated amount of $10.00 a week for two years, bringing the cash balance to $1,136.00; that interest on the $3,000.00 invested in the property at 3303-5 Grove Avenue at 6% amounted to $1,080.00, and 6% on the McGuire $2,000.00 investment, amounted to $240.00; that on March 1, 1930, she gave her daughter Marion $2,456.00 on her 18th birthday; that on March 1, 1933, Marion's 21st birthday, she gave her a statement showing a total indebtedness to her of $18,490.00, which is as follows:

Weekly savings and profits on real estate transactions, balance, as of March 1, 1933	$5,000.00
Three years' interest thereon at 6% per annum	900.00
March 1, 1931, loan by Marion of $1,000.00 to pay interest and taxes on Riverside property	1,000.00
Two years' interest thereon at 6% per annum	120.00
Amount received from Mrs. Leverenz on 11-24-24	5,000.00
8 years and 4 months' interest at 6% per annum	2,800.00
Amount received from Mrs. Leverenz 3-7-28	3,000.00
4 years' and 8 months' interest at 6% per annum	870.00
March 1, 1933, loaned by Marion	100.00
Total	$18,490.00

The court further found that Adam J. and Loretta F. Ensinger jointly acquired title to the property at 3303-5 Grove Avenue, Berwyn, by deed dated May 19, 1923; that by deed dated October 23, 1924, title was conveyed to Robert W. Teeter, conveyed it back to Adam J. and

Loretta F. Ensinger jointly; that by deed dated December 11, 1929, Adam J. and Loretta F. Ensinger conveyed to Doris Travis and Doris Travis by deed of same date conveyed this property to Loretta F. Ensinger; that on May 24, 1933, Loretta F. Ensinger executed a deed conveying the premises on Grove Avenue to Clarence R. Preiss, and that on the same date he conveyed the property to the Oak Park Trust & Savings Bank, as trustee; that Marion was sole cestui que of the trust; that said conveyances both bear the statement that the consideration paid was less than $100.00; that certain property known as 154 Aikenside Road, Riverside, was bought in 1927 by Adam J. and Loretta F. Ensinger at a cost of $6,300.00, and that the building erected thereon cost approximately $33,000.00, making the total cost between $39,000 and $40,000.00; that a $30,000.00 mortgage was placed on the Riverside property by the Berwyn State Bank; that no financial statement was made by the Ensingers at the time of so doing; that in 1933, the market value of the Aikenside Road property did not exceed $20,000.00, and that the value has not changed materially since then; that the claims of the plaintiffs against the property amounted to $14,500.00 at the date of foreclosure, the amount bid at the sale plus $8,750.36, the amount of the deficiency, or a total of $23,250.36, on which $650.00 has been paid; that on June 1, 1933, taxes against the property amounted to $2,169.14, and in March, 1934, the taxes amounted to $2,344.82; that Adam J. Ensinger testified that he always had property in his wife's name; that he bought many pieces, and that there was no particular reason for the transfer of the Grove Avenue property to his wife in 1929; that he was not then nor in 1931, in financial difficulties; that the family of Adam J. Ensinger consisted of his wife and his daughter Marion Ensinger, now occupying an apartment at 3303-5 Grove Avenue, Berwyn; that he operated a tavern in said premises; that at the time of the

[illegible]

conveyance of the Grove Avenue property from Adam J. to Loretta F. Ensinger, his assets were approximately $125,000.00, and his liabilities approximately $25,000.00 to $30,000.00; that on October 18, 1934, as Adam J. Ensinger testified, he was then paying rent for the store he occupied in the building, and had not occupied it in 1933 or 1934; that his brother occupied an apartment in the building and was paying no rent; that in 1933 and 1934 he paid $75.00 a month rent, but did not know for how many years, as his wife kept the books and took it out of the accounts; that Lorretta F. Ensinger testified that she could not remember the last time she deducted rents from the accounts of Adam; that on April 25, 1935, as Adam J. Ensinger testified, he paid $65.00 per month for the plumbing store on Grove Avenue to his wife since December 11, 1929; that after the property was conveyed to the Oak Park Trust & Savings Bank, he paid $50.00 per month to Marion Ensinger commencing in May, 1933; that he had no receipts but statements were made out; that Adam J. Ensinger has either lived in the building or conducted a business in it, or both, since its erection; that the notes upon which the deficiency decree were entered were bought through the Berwyn State Bank; that the first loan went into default in May, 1932, and about the final maturity of principal in May, 1933, but prior to May 24, 1933, Adam J. Ensinger stated to certain bondholders he was trying to make a loan on the Grove Avenue property to pay the mortgage on the Aikenside Road property; that Adam J. Ensinger stated that he spent considerable time and effort in seeking a loan; that the bondholders had gone along on the property, that the Grove Avenue property was clear, and if the bondholders would go along, they would get every cent, that he had other assets upon which he was trying to raise money; that Oscar Nelson, one of the bondholders offered to make a loan of $6,000.00 on the Grove Avenue property to pay interest and part principal upon the bonds and clean up taxes on the Aikenside Road and Grove Avenue pieces; that the plan was satisfactory to the

bondholders, but that Adam J. Ensinger stated that he wished to discuss it with his wife, and would let Mr. Teeter know; that at a later date, he stated that he could not make the Nelson loan; that at the time of the last mentioned statements, title to the property at 3303-5 Grove Avenue was in Lorretta F. Ensinger; that Mrs. Ensinger kept her husband's books and assisted him in financing the construction of buildings; that she was familiar with his and her assets and liabilities and with their joint obligations; that she knew of the negotiations of Adam J. Ensinger with the bondholders, and that he was acting on her behalf as well as his own; that at the time of a meeting in Teeter's office, certain of the bondholders knew that the title was in Mrs. Ensinger and knew that Mrs. Ensinger was using the property for business and residence purposes, but that they had no knowledge or notice of any indebtedness or claim by Marion Ensinger; that Marion Ensinger testified that she was born March 1, 1912; that she had not lately attempted to collect money due from her father and mother, and had never taken any legal steps so to do; that she made no suggestions as to investment and her parents never asked her advice; that she never demanded that the Grove Avenue property be transferred to her; that on March 1, 1930, she had a conference with her mother, who then gave her a statement of monies due to her; that her mother said she had no cash, but would try to pay or give her a guaranty within a reasonable time; that there were similar talks from time to time; that the Grove Avenue property was put in a trust fund for her; that she, Marion Ensinger began collecting the rents from the Grove Avenue property in 1933; that her father was paying $85.00 per month until February 1, 1935, when he dropped to $50.00 a month, which he has since paid; that her parents handled the tax bills for her; that she always lived with her parents, spent a year in Europe, returning in August, 1932; that she spent money for the upkeep of the premises

bondholders, but that [illegible]

disease it with his [illegible]

later [illegible]

at the time of the last mortgage [illegible]

at 3302-5 Grove Avenue [illegible]

kept her husband's [illegible] of construction

of buildings; that [illegible]

liabilities [illegible]

negotiations of [illegible]

was voting on her [illegible]

meeting in Detroit [illegible]

title was in the [illegible]

property for [illegible]

knowledge or notice [illegible]

that Marion Kimmer [illegible]

she had not legally [illegible]

mother, [illegible]

no suggestions in [illegible]

that she never [illegible]

to her; [illegible]

who then give her [illegible]

said she had no [illegible]

within a reasonable time; [illegible]

time; that the [illegible]

that she, Marion [illegible]

Avenue property [illegible]

until September [illegible]

the place and; [illegible]

she always [illegible]

in August, 1920; [illegible]

on Grove Avenue, approximating $3,000.00; that she had complete charge and management of the property and that the total amount which she collected from Adam J. Ensinger was $1,892.50; that Marion Ensinger knew of her parent's financial circumstances, that she loaned them money to pay expenses on the property, and discussed with her mother and grandmother the payment of sums due to her; that her father was in declining circumstances. The Master also found that Marion Ensinger is charged with knowledge of the circumstances of the conveyance; that she was a young girl without much business experience, but was of age and mentally competent; that she participated at least by acquiescence in the action of her parents; that if the savings fund and accumulations testified to by Loretta F. Ensinger could be said to be an intended gift to Marion, it existed only in contemplation and was not delivered and was not complete upon the conveyance of the property in trust for Marion at a time when Adam J. and Loretta F. Ensinger were insolvent; that until said conveyance, Loretta F. Ensinger never relinquished control or power to withhold said gift; that there existed no consideration upon which Marion could reach the savings fund and no consideration for a conveyance; that on March 1, 1931, Marion Ensinger loaned Adam J. and Loretta F. Ensinger $1,000.00 to pay interest and back taxes on the Aikenside Road property, and that interest on the loan was computed for two years at 6% amounting to $120.00; that on February 9, 1928, Marion Ensinger loaned her father and mother $100.00; that the sums of $5,000.00 and $3,000.00 delivered by Mrs. Leverenz to her daughter were also gifts, but from Mrs. Leverenz and not from Loretta F. and Adam J. Ensinger; that delivery of the said sums to Loretta F. Ensinger in the absence of revocation constituted a consideration for the later payments to Marion Ensinger, and revocation by Mrs. Leverenz would merely make her the creditor and not otherwise alter the

on urgent [illegible], on mortgage [illegible]
charge and [illegible] of [illegible] and [illegible] the [illegible]
she collected [illegible]
Manager [illegible] [illegible] [illegible]
loaned them money [illegible]
her mother and grandmother [illegible]
father was in [illegible]
Marion Emmigret is [illegible]
conveyance; then she [illegible] young girl [illegible] business [illegible]
but was of [illegible] and [illegible]
lost by negligence in the [illegible]
savings fund and [illegible]
could be [illegible] an interest [illegible]
contemplation [illegible]
conveyance [illegible]
d. and Loretta [illegible]
Loretta [illegible]
said girl; [illegible]
could [illegible]
that [illegible]
Emmigret [illegible]
road property, [illegible]
years of [illegible]
Emmigret loaned [illegible]
$5,000.00 and [illegible] relinquished [illegible]
were also girls, but [illegible]
[illegible] and
Emmigret in the [illegible]
the latter [illegible]
would [illegible]

obligation of the Ensingers; that exclusive of the savings fund, the amount claimed as consideration for the disputed conveyances were as follows:

Amount advanced by Mary Ann Leverenz on 11-24-24	$5,000.00
Interest thereon at 6% per annum to 3-1-33	2,500.00
Loaned by Marion Ensinger to Loretta F. Ensinger on 3-9-28	100.00
Amount advanced by Mary Ann Leverenz on 5-7-28	3,000.00
Interest thereon at 6% per annum to 3-1-33	870.00
Loaned by Marion Ensinger to Loretta F. Ensinger on 3-1-31	1,000.00
Interest thereon at 6% per annum to 3-1-33	120.00
Loaned by Marion Ensinger to Loretta F. Ensinger on 3-1-33	100.00
	$12,690.00

that on March 1, 1930, Marion Ensinger's 18th birthday, she received $2,456.00 from her mother, $2,000.00 of which she expended on a trip to Europe, lasting approximately a year. Subtracting $2,456.00 and interest thereon at 6% from March 1, 1930, to March 1, 1933, amounting to $442.08 from the $12,690.00 leaves $9,791.92, which as a consideration for the conveyances for Marion Ensinger's benefit, is inadequate; that during the year 1933, the real estate market in Berwyn was very poor, there were few sales, and what sales of improved and vacant property were made, were practically all forced by unfavorable financial conditions of the owners; that speculators were substantially the only buyers, and offers were very low, so low as to be generally unacceptable, except under the urge of necessity; that the fair cash market value of 3303-5 Grove Avenue on May 24, 1937, was approximately $18,500.00, and of the vacant 125 feet approximately $45.00 per foot, or $5,625.00; that the combined fair cash market value on said date was $24,125.00; that the lien of taxes, special assessments and mortgages aggregated approximately $6,063.59, leaving a net of $18,061.41; that on June 29, 1931, a bill of complaint was filed by Isadore E. Kastel against the Berwyn State Bank to enforce a superadded liability of stockholders; that a decree was entered against

obligation of the [illegible]; in [illegible], the amount claimed as consideration for the [illegible] were as follows:

Amount advanced by [illegible] on 11-[illegible] . . . . . .
Interest thereon at [illegible] to 2-1-[illegible] . . . . . .
Loaned by Union Mortgage to [illegible] on 2-1-[illegible] . . . . . .
Amount advanced by [illegible] on 2-[illegible] . . . . . .
Interest thereon at [illegible] to 2-1-[illegible] . . . . . .
Loaned by Union Mortgage to [illegible] on 2-1-31 . . . . . .
Interest thereon at [illegible] to 2-1-[illegible] . . . . . .
Loaned by [illegible] . . . . . .
2-1-32 . . . . . .

that on [illegible] 1, [illegible] 19[illegible], [illegible] 3,[illegible].20 from her [illegible] to Europe, leaving [illegible] interest thereon at [illegible] to 1[illegible].36 from the [illegible] ation for the conveyances [illegible] it; during the year 1[illegible], [illegible] door, there [illegible] property were [illegible] financial condition of the [illegible] the only [illegible] unsecured, [illegible] market value of 3[illegible]- [illegible] 3[illegible],[illegible].00, one of the [illegible] or 1[illegible]; [illegible] the [illegible] mortgages aggregated [illegible] 1[illegible],081.41; that on June [illegible] leaves a [illegible] adjusted liability of stockholders; [illegible] that

Loretta F. Ensinger for $1,000.00 and $10.00 costs, which is due and unpaid; and that the certain conveyances made May 24, 1933, to the trustee, were made with the intent to defraud creditors. From all this testimony, the records show that the Master and court concluded that the consideration for these transfers was inadequate and that Adam J., Loretta F. and Marion Ensinger all knew of and participated in the intent to defraud creditors through the execution of these conveyances. The court ordered and decreed that the conveyances of May 24, 1933, executed by Adam J. and Loretta F. Ensinger to Clarence R. Preiss and from Clarence R. Preiss to the Oak Park Trust & Savings Bank, as Trustee, (conveying all of the Grove Avenue property in question) be set aside and vacated and declared null and void. It was further decreed that Keller be authorized to proceed to levy an execution upon the Grove Avenue property for the payment and satisfaction of his judgment against Adam J. Ensinger, provided said judgment, interest and costs are not paid by Marion Ensinger, or by some of the defendants, within 30 days of the entry of the decree. The decree fixes the Master's fee at $539.32, which are taxed as costs herein against Adam J., Loretta F. and Marion Ensinger, Doris Travis and Clarence R. Preiss, and orders that the parties obtaining deficiency decrees be authorized to levy an execution upon the Grove Avenue property for $6,100.36; that Oscar Nelson be authorized to levy an execution on his judgment for $3,207.50 upon the same property; that Isadore B. Kastel and Frank Sampson, receiver, be authorized to levy an execution against Loretta F. Ensinger for $1,000.00 and $10.00 costs, on the Grove Avenue property, and that Adam J., Loretta F. and Marion Ensinger pay the costs of this proceeding.

The facts as stated by the Master in his report, and as adopted by the court in its decree, and which, as stated, are not disputed, seem to indicate that at the time of the conveyances by

these defendants, they were both insolvent. The liabilities of the defendant, as the record indicates at that time, were largely in excess of $40,000.00, and their assets consisted of what are termed the Aikenside Road property, upon which a valuation of $17,830.00 was placed, and the Grove Avenue property, upon which a valuation of $18,061.00 was placed. The record further indicates that at these times, their assets did not exceed $36,000, and that the indebtednesses due the various plaintiffs had accrued sometime before the time of these conveyances, and that defaults thereon had occurred more than one year prior to the date of the deeds of conveyance. Before the conveyances were made, Keller filed his original complaint, and it is shown that the judgment upon which this bill is predicated was entered several months prior to the date of the conveyance. It is also shown that upwards of a year prior to May 24, 1933, the stockholders suits of Frank Sampson and Isadore H. Kastel had been filed, and that the Nelson judgment was entered several weeks after the conveyance. Nelson instituted his foreclosure suit about a week after the conveyance of May 24, 1933. It is also shown by the evidence that the Ensingers, about this time, attempted to procure further loans on the property and failed, and that shortly thereafter they conveyed the properties to the trustee, as hereinbefore set forth. In view of the fact that none of the facts, as found by the court and the Master, are xxxxxxxx disputed, we are of the opinion that the court was fully justified in following the Master's report and in entering the decree appealed from.

In Pasedach v. Auw, 364 Ill. 491, the Supreme Court said:

"The master in chancery saw the witnesses and heard them testify. It was his province in the first instance to determine the facts. While his finding of facts does not carry the same weight as the verdict of a jury, nor of a chancellor where the witnesses have testified before him, yet the master's findings

these documents, they were [illegible]. [illegible] of the defendant, in the record [illegible] at that time, [illegible] in excess of $[illegible], and [illegible] possibly [illegible] the financing [illegible] only. [illegible] was placed, and the [illegible] property, [illegible] of $18,000.00 [illegible] times, their assets [illegible] excess [illegible] time of these conveyances, and that [illegible] more than one year prior to the date of [illegible] Before the [illegible] and it is [illegible] was entered [illegible] is also shown that [illegible] holdings with [illegible] and that [illegible] conveyance. [illegible] the conveyance [illegible] that the [illegible] loans on the property [illegible] conveyed the [illegible] in view of the [illegible] the [illegible] XXXXXXXXXX [illegible] court [illegible] on the [illegible].

In [illegible], the [illegible] "[illegible] in an [illegible] testify. [illegible] the [illegible] weight [illegible] witnesses [illegible] witness's findings

are entitled to due weight on review of the cause. (Keuper v. Hette, 239 Ill. 586.) His conclusions as to the facts have been approved by the chancellor. In that situation we are not justified in disturbing the findings unless they are manifestly against the weight of the evidence. North Side Sash and Door Co. v. Hecht, 295 Ill. 515; Klekamp v. Klekamp, 275 id.98.)"

The decree of the Superior Court of Cook County is affirmed.

DECREE AFFIRMED.

HEBEL, P.J. AND DENIS E. SULLIVAN, J. CONCUR.

are entitled to due weight on review of the law. Fenner v. Kelly, 272 Ill. 388.) His conclusions as to the facts have been approved by the commission. In the [illegible] not justified in disturbing the findings unless they are manifestly against the weight of the evidence. Pontiac Lake Sand and Gravel Co. v. Keogh, 235 Ill. 211; Lawson v. Industrial Com. 72 Ill. 38.)"

The decree of the Superior Court of Cook County is affirmed.

Affirmed.

KERNS, P.J. and McGOOEY, J. concur.

39771

GEORGE F. KELLER, OSCAR NELSON, ELOF A. HOLMBERG, MABEL PRENTICE, E. G. MISENER, MARY B. GAMEN, MARGARET McGRAGHTY, JOHN RAWLINGS, NONA BRESZE, E. A. CHLOUPEK, CHARLES H. ALBERS, as Receiver for Berwyn State Bank, ISADORE KASTEL, and FRANK SAMPSON, Receiver,

Plaintiffs - Appellees,

v.

ADAM J. ENSINGER, LORETTA F. ENSINGER, DORIS TRAVIS, OAK PARK TRUST AND SAVINGS BANK, Trustee, CLARENCE R. PREISS, DANIEL GOMBINER and MARION ENSINGER,

Defendants,

MARION ENSINGER and DORIS TRAVIS GLEN,

Appellants.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

297 I.A. 633

ON REHEARING

MR. PRESIDING JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

While the petition for rehearing is but a reargument of the same points made on the submission of the case to this court, still, in view of the complex nature of the issues involved, we deemed it proper that we should reexamine the points made by the petitioner. However, a reconsideration of all the points made in the petition, and the reply thereto, has lead us to the conclusion that our former opinion is right, and therefore, it will be readopted.

JUDGMENT AFFIRMED.

HEBEL AND DENIS E. SULLIVAN, JJ. CONCUR.

39863

HARRY GOLD and L. I. SCHURMAN, et al.,
Appellants,
v.
METROPOLITAN TRUST COMPANY, a corporation, et al.,
Appellees.

APPEAL FROM
SUPERIOR COURT
COOK COUNTY.

297 I.A. 633

MR. PRESIDING JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

Harry Gold and L. I. Schurman filed a complaint in the Superior Court of Cook County, in which certain trust agreements are set forth relating to two separate apartment buildings in the city of Chicago, and in which it is alleged that Barnet L. Rosset, Charles Cohen and Leo Ginsberg were acting as trust managers for one of the buildings, and that Barnet L. Rosset, Robert W. Schiller and Leo Ginsberg were acting as trust managers for the other, and that Gold and Schurman are the owners of certain interests in these buildings. It is further alleged that on October 4, 1935, at the request of Rosset and others, Gold entered into a management contract with these persons for the management by him, of the buildings. The bill charged malfeasance on the part of the trust managers, and also charged that these trust managers had illegally cancelled Gold's contract of employment. Upon a hearing on the complaint, the court entered a temporary injunction order restraining Rosset, Cohen, Schiller and Ginsberg from interfering with Gold in the management of the buildings. From this interlocutory order an appeal was taken to this court, case No. 39634 which is consolidated with the instant case for the hearing. Two defendants in the original bill named Samuel Fumel and and J. B. Goldberg had filed answers and counterclaims, in which they urged that Gold be retained as manager, charged malfeasance as to the trustee and trust managers, and prayed that they be removed. The Metropolitan Trust Company, as trustee of the properties, as hereinafter set forth, filed a separate complaint, seeking to enjoin Gold from

38865

HARRY GOLD and I. I. [illegible] et al.,

Appellants,

v.

METROPOLITAN TRUST COMPANY, a corporation, et al.,

Appellees.

MR. PRESIDING JUSTICE [illegible]

Harry Gold and I. I. Schwerin filed a complaint in the Superior Court of Cook County, in which certain [illegible] set forth relating to the separate [illegible] in the city of Chicago, and in which it is alleged that [illegible] Cohen and Leo Ginsberg were acting as trust managers [illegible] buildings, and that [illegible] Ginsberg were acting as trust managers for the [illegible] and Schwerin are the owners of certain interests in these buildings. It is further alleged that on October 6, 1939, at the request of Rosset and others, said managers [illegible] management contracts with these persons for the management by them, of the buildings. The plaintiffs [illegible] misfeasance on the part of the trust managers, and also charged that these trust managers had illegally terminated certain contracts of employment. Upon a hearing on the complaint, the court entered a temporary injunction order restraining Rosset, Cohen, Ginsberg and Ginsberg from interfering with said [illegible] in the [illegible] from this interlocutory order an [illegible] taken in this case. [illegible] case No. 38824 which is concerned [illegible] hearing. Two [illegible] in the [illegible] and I. I. Goldberg [illegible] filed answers [illegible] urged that they could be not liable [illegible] threaten and [illegible] and [illegible] the Metropolitan Trust Company, as trustee [illegible] set forth, filed a [illegible] complaint, [illegible] said from

interfering with the operation of the buildings. These causes were consolidated in the Superior Court for a hearing. Subsequent to the entry of the temporary injunction order, and after the interlocutory appeal therefrom, the consolidated causes in the Superior Court were referred to a Master, and after a large amount of testimony was taken, the Master made a report. The Master found that the trustees had performed their duties under the terms of the trust agreement, and recommended that they be retained. He also recommended that they be enjoined from discharging Gold. After hearing exceptions to the report, the court entered a decree finding that neither Gold, Schurman, Fumel nor Goldberg had sustained the allegations of their pleadings, and ordered that the original complaint of Gold and Schurman and the counterclaim of Schurman, Fumel and Goldberg be dismissed for want of equity, that the temporary injunction of May 23, 1927, be dissolved and that the costs be taxed against Gold and Schurman. After the entry of the decree, Gold and Schurman moved to amend it by adding to the portion thereof dismissing their complaint for want of equity, the words: "without prejudice to the rights of plaintiff, if any, to sue at law." This motion was denied. The appeal is by Gold and Schurman from the decree and the order denying his motion to amend. Samuel Fumel and J. B. Goldberg have filed a brief as "cross appellants". The record contains no notice of appeal by either.

About 1924, two separate bond issues of $300,000.00 each, secured by two separate mortgage trust deeds, one on each of the buildings, were sold. These bonds were defaulted in 1929, and foreclosure proceedings were instituted. Thereafter, a bondholders' protective committee was organized, the bonds were called for deposit by the committee, and something over 93% of such bonds were deposited. In April, 1935, Mabel Meidemann and Estelle Meinberg, who claimed to be in control of the equity of redemption of each of the properties,

interfering with the operation of the mill [illegible]
consolidated in the district court or by [illegible]
the entry of the preliminary injunction [illegible]
loquitory appeal thereafter, the general [illegible]
Court were referred to a [illegible] [illegible]
many was taken, the matter [illegible]
trustees had erected their mill [illegible]
ment, and recommended that they be [illegible]
they be enjoined from disobeying [illegible]
the report, the court entered [illegible]
Bohrman, but not children [illegible]
pleadings, and ordered that the original [illegible]
Bohrman and the count relied of [illegible]
dismissed for want of equity, but [illegible]
1827, he dissolved and in [illegible] [illegible]
Bohrman. After the entry of the decree, [illegible] moved to
amend it by adding to the portion thereof dismissing their complaint
for want of equity, the words: "without [illegible] to the rights of
plaintiff, if any, to sue at law." [illegible]
is by Gold and Bohrman from the [illegible]
motion to amend. [illegible]
as "cross appellants". The record [illegible]
either.

About 1874, two [illegible]
secured by two separate [illegible]
buildings, [illegible]
closure proceedings [illegible]
protective committee [illegible]
by the committee, [illegible]
In April, 1878, [illegible]
be in control [illegible]

submitted to the committee proposals for the reorganization of both of the properties under liquidating trust agreements; that the title to the properties be acquired by redemption from the foreclosure sale; that this trustee issue new securities in the nature of certificates with beneficial interest to the former holders of the bonds, and these two persons also proposed that they receive in exchange for the equity, 12-1/2% of the certificates of beneficial interest to be issued to bondholders; also that all of the expenses of the reorganization, and the expenses of the foreclosure proceeding, be met by new first mortgages on each of the premises. It was further proposed that contracts of management for five years' duration be entered into with Gold, under which he should manage the properties, secure tenants, collect the rents and receive compensation equivalent to 5% of the gross receipts. These proposals were accepted by the committee, and notice of the adoption of the plan was given to the bondholders. Subsequently, this plan was consummated, the equity of the redemption was conveyed to the committee, redemption of the property was made, complete title was acquired by the Metropolitan Trust Company, as trustee, under these trust agreements, and the trust agreements were formally accepted. Thereafter, new mortgages were placed upon each of the properties to secure the sum of 17,000.00 borrowed on each, which sum was to be used to secure waivers of tax objections. Under the plan adopted, three trust managers were to be and were appointed, one was to be selected by the owners of the equity of redemption, one to be a member of the bondholders' committee, and the third was to be an original purchaser and holder of bonds. On behalf of the owners of the equity of redemption on both buildings, Leo L. Ginsburg was appointed, and Barnet L. Hosset, by the bondholders' committee, on each of the buildings. The third trust manager in the case of one building was Charles Cohen, and for the other, Robert M. Schiller. Both of these latter represented original holders of bonds,

submitted to the committee prior to its for the [illegible] of such of the properties under liens [illegible] a mortgage; that the title to the properties be acquired by [illegible] from the foreclosure sale; that this trustee issue new securities in the [illegible] of certificates with coupons [illegible] to the [illegible] of the bonds, and these two classes [illegible] in exchange for the equity, [illegible] of the certificates of [illegible] interest to be issued to bondholders; also to [illegible] of the reorganization, [illegible] be met by new first mortgage [illegible] of the company. It [illegible] proposed that a committee [illegible] be entered into with such, under which [illegible] secure benefits, collect the bonds and receive compensation [illegible] to 5% of the gross receipts. Such securities were accepted by the committee, and notice of the [illegible] of the [illegible] in the bondholders. Subsequently, this [illegible] abandoned, the [illegible]ity of the redemption was conveyed to the committee, [illegible] of the property was made, complete title [illegible] by the Metropolitan Trust Company, as trustee, under these [illegible] and the trust certificates were formally accepted. [illegible], the mortgages were [illegible] upon each of the properties [illegible] was of $17,000.00 [illegible] on each, which was to [illegible] arrears of [illegible]. Under the plan [illegible], three [illegible] were to [illegible] appointed, one was to be [illegible] of the [illegible] of redemption, one to be a member of the [illegible] committee, and the third was to be an original person [illegible] of bonds. [illegible] of the owners of the equity of redemption on both buildings [illegible] Dinsmore was an [illegible] owned by the bondholders' committee, on each of the buildings. The total trust [illegible] in the case of one building was [illegible] or the other, [illegible] bondholders. Both of these [illegible] rights [illegible]

We will first pass upon the question as to whether or not Gold, as an employee, can maintain an action for injunction to prevent his discharge. On this phase of the case, counsel for Gold and Schurman insist that "equity must grant relief, because no remedy at law would be complete, plain or adequate." They cite the case of Doherty v. Schipper & Block, 250 Ill. 128, as authority for this proposition. In that case, an action was brought against Schipper & Block, a corporation, by one E. Doherty to recover for eight weeks service at $25.00 per week, rendered by plaintiff to the defendant. Plaintiff recovered judgment for $200.00. On appeal to the Appellate Court, 2nd District, the judgment of the Circuit Court in which the judgment was entered, was reversed without remanding, and under a certificate of importance the appeal was prosecuted in the Supreme Court. As recited in the statement of the case by the Supreme Court, it appears that the plaintiff was employed by Schipper & Block for 18 weeks at $25.00 per week, payable weekly, and that at the end of the ninth week, she was discharged and paid in full for the time she had worked. Thereafter, and on the following day after her discharge, she offered to continue to work, but was refused permission. At the end of the following week she brought suit before a Justice of the Peace for one weeks' wages and recovered judgment for $25.00 and costs, which was paid. At the trial in the Circuit Court, the court refused to hold the following proposition of law:

> "The court holds that the recovery of the judgment and a satisfaction of the same, as shown in the evidence in this case, in the suit formerly brought by the plaintiff against the defendant before William Fielder, then a justice of the peace in and for Peoria County, Illinois, is a bar to the plaintiff's right of action in this case, and the plaintiff cannot recover in this suit, and the finding must be for the defendant."

The question before the Supreme Court was whether or not the first judgment rendered by a justice of the peace was a bar to the action wherein the plaintiff recovered a judgment for $200.00. The court

there held that the judgment recovered before the justice of the peace was a complete bar to the subsequent action, and said:

> "It is well settled that in case an employee is discharged without cause before his term of employment has expired and he has been paid in full up to the time when he is discharged, he may treat the contract of hiring as continuing and bring an action for a breach of the contract of employment against his employer for discharging him, and if the suit is not commenced, or if commenced before but not tried, until his term of employment has expired, he may recover the contract price of his wages, less what he has earned or by reasonable diligence could have earned in other employment subsequent to his discharge."

This is the only case cited by Gold as authority for his proposition that his remedy as to his employment, is in equity, and that defendants should be enjoined, as prayed. We are of the opinion that his claim in this regard is without merit, and that the court was not in error in not enjoining defendants from discharging him. Kennicott v. Leavitt, 37 Ill. App. 435. High on Injunctions, (3 ed.) volume 2, section 1112.

As already noted, Gold and Schurman, alone, appeal from the decree dismissing the bill. In the complaint, and as a basis for their claimed right to urge the ousting of the trustee and the trust managers of the estates, Gold and Schurman claim that they each have a beneficial interest in the estates, inasmuch as they are holders of certain of the certificates of such interest.

As a witness in the trial of the cause, on cross examination, Gold was asked, "Did you purchase any units or certificates of interest in either of the trusts?" Answer: "I did not". The following questions were also propounded to him: "Did you purchase any during the year 1937?" Answer: "That I can't remember." Question: "You can't remember whether you purchased any in 1936?" Answer: "No." Question: "If any were purchased, you would have paid for them, would you not?" Answer: "I imagine so". Further, on cross examination, he testified to the effect that he had no knowledge of any of these certificates of interest in these properties having been purchased or

there [illegible]

peace [illegible] a counsel [illegible]

> "It is [illegible]
> without [illegible]
> has been [illegible]
> may [illegible]
> action for a [illegible]
> employer for [illegible]
> or if compensation [illegible]
> ment has expired, [illegible]
> wages, less [illegible]
> have arrived [illegible]

This is the only [illegible]

that his remedy is [illegible]

should be [illegible]

in this [illegible]

in not applying [illegible] Lavalle, 37 Il. [illegible]

section 111.

[illegible]

decree dismissing [illegible]

claimed right to [illegible]

managers of [illegible]

a benefit [illegible]

certain of the certific[illegible]

[illegible]

Cold [illegible]

in either of [illegible]

questions were [illegible]

the year 1877 [illegible]

don't remember [illegible]

question: "If [illegible]

you not" answer: "[illegible]

testified [illegible]

certificates [illegible]

sold by anybody. We find nothing in the record to indicate that either Gold or Schurman ever were the owners of any interest in these properties, or in the so called certificates of interest.

In addition to the lack of any showing of interest in any of these properties which would give either Gold or Schurman the right to maintain an action involving the persons in charge of the properties, we call attention to the fact that both the Master and the Chancellor, after reviewing all the testimony, found that there was an entire lack of any showing of mismanagement or malfeasance on the part of any of these officers.

In Pasedach v. Auw, 346 Ill. 491, the Supreme Court said:

> "The master in chancery saw the witnesses and heard them testify. It was his province in the first instance to determine the facts. While his finding of facts does not carry the same weight as the verdict of a jury, nor of a chancellor where the witnesses have testified before him, yet the master's findings are entitled to due weight on review of the cause. (Keuper v. Mette, 239 Ill. 586.) His conclusions as to the facts have been approved by the chancellor. In that situation we are not justified in disturbing the findings unless they are manifestly against the weight of the evidence. North Side Sash and Door Co. v. Hecht, 295 Ill. 515; Klekamp v. Klekamp, 275 id. 98."

We are of the opinion that the court was not in error in dismissing the bill for want of equity. The decree of the Superior Court of Cook County is affirmed.

DECREE AFFIRMED.

HEBEL AND DENIS E. SULLIVAN, JJ. CONCUR.

sold by anybody. [illegible] in the [illegible]
either Doll or [illegible] any [illegible]
properties, or in the so called [illegible]

In relation to the [illegible] any [illegible]
of these properties which could [illegible]
right to maintain a action involving [illegible] of the
properties, we call attention to the [illegible] and
the Chancellor, after [illegible] "[illegible]" [illegible]
was an entire lack of any [illegible] on
the part of any of these [illegible].

In [illegible] v. [illegible], [illegible] [illegible]:

> "The matter in dispute [illegible] and [illegible]
> reality. It was the property [illegible] to satisfy
> the facts. While the [illegible] not a [illegible]
> weight as the verdict [illegible], nor [illegible] the
> witnesses have testified [illegible], yet the [illegible]
> are entitled to due [illegible] of the [illegible]. (See [illegible] v.
> [illegible], 355 Ill. 355.) [illegible] to the [illegible]
> approved by the [illegible]. In [illegible] not [illegible]
> in disturbing the [illegible] unless they [illegible]
> the weight of the [illegible]. [illegible] v. [illegible],
> 355 Ill. 355; [illegible] v. [illegible], [illegible]."

In view of the [illegible] we are not in error in
dismissing the bill for [illegible]. The decree of the [illegible]
Court of Cook County is [illegible].

[illegible]

[illegible]

39975

RICHARD WAGNER JR., a Minor by RICHARD WAGNER SR., his father and next friend,

Appellee,

v.

GUY MACELLI and WILLIAM N. ERICKSON,

On Appeal of WILLIAM N. ERICKSON,

Appellant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

297 I.A. 633

MR. PRESIDING JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

Defendants appeal from a judgment for the sum of $2,000.00 entered against them on the verdict of a jury on July 9th, 1937. The action is based upon the charge that Richard Wagner Jr. was injured through the negligence of defendant Macelli in the operation of an automobile, while employed by defendant Erickson.

The evidence of plaintiff, Richard Wagner, Jr., who sues by his father Richard Wagner, Sr., as his guardian, is to the effect that on August 27, 1935, he was of the age of ten years, and was playing ball with some other boys in Clifton Street in the City of Chicago; that while these boys were playing, the defendant Macelli drove the automobile in this street from the north to the south on the west side of the street; that immediately before the accident, plaintiff ran from a point about two feet from the west curb toward the center of the street in order to catch a batted ball, and that as he did so, he collided with the automobile driven by the defendant, and as a result thereof, suff red severe injuries. Plaintiff was taken to a hospital, where he was treated for his injuries, and the testimony of the attending physician is to the effect that after the boy was brought to the hospital, he examined him and found a compound dislocation of his right ankle, that the skin around the ankle joint and all the tissues were torn down to the bone, which

was exposed, that the tendons were torn at the joint, that plaintiff had a bruise on his left arm, that he was bleeding, and that there was considerable dirt in the wound and considerable swelling. The witness further stated that he cleaned the wound, cut off the dirty torn tissues, set the dislocation, raised up the torn muscles and ligaments, and closed the injured place with a drainage tube, and put the leg in a splint; that in treating the wound, he took a dozen or two stitches, the exact number of which he did not clearly recollect. Also, that after that, he saw the patient on an average of three times a day for two weeks or so, and thereafter, twice a day until he was taken home; that about four days after the treatment above mentioned, he found a marked infection, together with considerable swelling from the hip to the ankle; that thereafter he had the patient taken to the operating room and put three drains in his leg, which was especially painful; that these drains remained for four or five days, after which the witness removed them; that during the time of the treatment, the patient had a high temperature and much pain, that he had to be given drugs in order to ease the pain, and that the bandages remained on the injured portion of his body for about two weeks. He also stated that the patient was confined to his bed for two and a half weeks at the hospital, and after that for a time at home, after which the patient propelled himself about with a wheel chair; that he treated him for a time after he was taken home by putting on hot dressings, and that this last treatment continued for about ten days to two weeks, which treatment consisting in dressing the wound. He stated that subsequently the patient was up and around on crutches for a couple of months, and that he came to the office of the witness thereafter for treatment three or four times a week. The witness stated that, contrary to the opinion formed by him at his first diagnosis, the patient subsequently made a perfect recovery.

A witness named Robert Miller, testified that he was one of the boys playing with plaintiff just prior to the accident in question, and his description of the accident and the manner in which it happened, is very similar to that of the plaintiff. In addition, he stated that in his opinion, at the time of the accident, the automobile was going south about 30 miles an hour, and that after the car had struck the plaintiff and run over his foot, it stopped a distance of 15 or 16 feet away from him. A motion was made by plaintiff's attorney to strike the testimony of the witness with reference to his opinion as to the speed of the automobile just before the accident, on the ground that no proper foundation had been laid for such an opinion. The court reserved its ruling, and from the record, it appears that the motion was never passed upon.

Another witness was produced by plaintiff, who testified to substantially the same set of facts as that given by the last witness, except that this boy stated that in his opinion, the speed of the automobile just prior to the accident was from 15 to 30 miles an hour.

The defendant Macelli, as plaintiff's witness, testified that at the time and just prior to the accident, he was proceeding south on the street in question at a speed of about 15 miles an hour; that one of the boys batted a ball out into the street, and that at that moment he noticed something bump into the rear end of his car, that he then noticed one of the boys lying in the street, and that he, together with some of the other boys, picked the boy up and took him to the Illinois Masonic Hospital. He also stated that he noticed that as one of the other boys hit the ball, plaintiff "flew" right out from the right side of the street after it, and came in contact with the rear end of his car. On cross-examination, this witness

[illegible]

the boys [illegible] with [illegible] [illegible]
question, and his description of the [illegible] and [illegible]
which it [illegible] one, in [illegible] [illegible]
addition, he stated [illegible] [illegible]
the automobile [illegible]
after [illegible]
stopped [illegible]
made by [illegible]
with reference to [illegible]
before the [illegible]
laid for such an outlook. [illegible]
the [illegible]

Another [illegible]
substantially [illegible]
except that [illegible]
automobile just prior to the [illegible]

The defendant [illegible]
that at the time and [illegible]
south on the street in [illegible]
that one of the boys [illegible]
that moment he noticed something [illegible]
that he then noticed [illegible]
together with some of [illegible]
him to the Illinois [illegible]
that as one of the [illegible]
out from the right side of [illegible]
with the [illegible]

stated that he did not know that he had hit the boy until after the accident; that his car had four wheel brakes, which were in good condition; that he put the brakes on hard; that after the accident, the officers tested his brakes and found them in good working condition; that the car did not skid on the pavement, although he looked for skid marks; that putting on the brakes made a little noise, which was caused by his effort to stop the car so suddenly.

It appears that the defendant William N. Erickson, at the time of the accident, was a member of the Board of County Commissioners of Cook County, that at that time, he was in the laundry business which was conducted under the name of the Blue Ribbon Laundry, and that the driver of the car, defendant Macelli, was the owner of the car in question and was employed by the defendant Erickson, occasionally, to collect and deliver laundry, that Macelli also helped inside the laundry plant, and that for his services he was paid by Erickson. He also stated that at the time of the accident in question, he was on an errand for Erickson, and that the accident happened between 11 and 12 o'clock in the morning. Shortly after the accident Erickson was notified by plaintiff's father of the happening, and he visited the plaintiff at the Illinois Masonic Hospital, where plaintiff was being treated. Erickson, sent the following communication to the hospital:

"Board of Commissioners,
Cook County, Illinois

Illinois Masonic Hospital,
836 Wellington Avenue,
Chicago, Ill.

Gentlemen:

I am returning herewith statements and bill sent to me for Master Richard Wagner. These bills are being sent to me in error, as I am in no way involved in this matter.

stated that he did not know [illegible] the boulevard; [illegible] good condition, that he [illegible] accident, the officers [illegible] working condition; that the [illegible] be looked for skid marks; [illegible] noise, which [illegible]

It appears that [illegible] the time of the accident, [illegible] Commissioners of Cook County, [illegible] laundry business which [illegible] ribbon laundry, but that [illegible] was the owner of the car in question [illegible] defendant wickson, occasionally, to [illegible] Mucelli also helped inside the laundry [illegible] services he was [illegible] by Wickson. [illegible] of the accident in question, [illegible] that the accident happened between 11 and 1 o'clock in [illegible] Shortly after the accident Wickson [illegible] and the father of the boy, and he visited the patient at the Illinois Masonic Hospital, where [illegible] Wickson, sent the following communication to the [illegible]:

[illegible]
[illegible], Illinois

Illinois Masonic Hospital,
836 Wilkington Avenue,
Chicago, Ill.

Gentlemen:

I am returning [illegible] for Master Leonard [illegible] error, as I am in no way involved in this [illegible].

I took personal interest in the matter to see that the situation was taken care of inasmuch as Mr. Macelli works for me. However, the accident was caused with his own personal car and not with any equipment owned by me.

Neither Mr. Macelli nor I made any arrangements with the hospital to take care of this case, or did we say that we would assume any responsibility or pay any bills.

Yours very truly,
William N. Erickson,
Cook County Commissioner."

The usual motions were made for a directed verdict, which were denied, and the cause was submitted to the jury.

The principal ground urged by the defendant for a reversal is that the remarks of plaintiff's attorney to the jury were prejudicial, and for that reason, the judgment should be reversed. In his address in speaking of defendant Erickson, counsel for plaintiff made the following statements:

"Mr. Hanna: Now what did this Mr. Erickson, this County Commissioner, this common politician, do? Just like any politician, having made his promise, his promise to pay the hospital bill of this boy, he broke it - just a cheap, dirty political trick. Can there be any doubt of that, of the value of the word of this County Commissioner, this politician, operating a laundry for the sole purpose of getting the business of the city's schools through politics?

"Mr. Mead: Your Honor, this is highly improper. We do not desire to interrupt, but -

"Mr. Hanna: A tax-eating politician that makes this poor young lad, himself a pupil at those schools that make this man rich, bring him to Court. So I took a personal interest in the matter. * * * I can visualize that picture of the great big hearted Mr. Erickson crying. I can just picture Mr. Erickson crying his heart out, great big hypocritical tears, political tears, because some one of his employees got into trouble, can't you? I can visualize that xxxxxxxxxxxxxxxxxxxxxxxxxxx and I can visualize him the next minute turning around when he sees he is going to be a possible defendant because his automobile struck and injured a boy. The old politician is working again, he is getting in the old double-cross, that is what they call it in politics, and that is what he is trying to do with Mr. Macelli in this case, and we are not going to let him do it, and I don't think you are either.

"Mr. Andreen: I object, your Honor, to this argument.

"Mr. Hanna: He knows the truth hurts.

"The Court: Proceed - follow the evidence - the jury knows the evidence.

I took personal [illegible]
situation [illegible] been one of [illegible]
However, [illegible]
not with any [illegible] by me.
Neither Mr. [illegible] any [illegible]
hospital to [illegible] case of this case, [illegible]
assume any responsibility or [illegible] any [illegible].

Yours [illegible],
William A. [illegible],
[illegible].

The usual waiting [illegible]

were denied, and the [illegible] jury.

The principal, [illegible]

is that the [illegible]

judicial, [illegible]

his address in [illegible]

made the following [illegible]

"Mr. Judge: Now what [illegible] Commissioner, this common political [illegible] politician, [illegible] hospital bill of this [illegible] political trick. [illegible] of the road of this country [illegible] a laundry for the [illegible] city's schools [illegible] not desire to interrupt, but -

"Mr. [illegible]: [illegible] young lad, himself a [illegible] tion, urging him to [illegible] the matter. [illegible] Mr. Dickson [illegible] crying his heart out, [illegible] tears, because more [illegible] you! I can visualize [illegible] visualize his the [illegible] going to be a [illegible] and injured [illegible] getting in the old [illegible] politics, and that is what [illegible] in this case, and we are not [illegible] don't think you are [illegible].

"Mr. Andersen: I object, [illegible]

"Mr. Hunter: He [illegible]

"The Court: Proceed - [illegible] - the jury [illegible] the evidence.

"Mr. Hanna: Well, you men know politicians too well to be fooled. However, the accident was caused, he was in no way to blame, he says. * * * What does it take to get school business? Why, you men know the answer - politics - just some such position as he holds that gets the school business, and that is the reason why he is in the laundry business. * * * Now there is one thing in this case that is not denied, it stands unequivocally alone. Mr. Erickson has a very convenient memory. Well, political education helps that; you know that is, it is all promises before election, and just try to get one promise kept afterwards. He forgot about the promise."

The evidence in this case was of such a character that it should have been carefully and judicially submitted to the jury - if submitted at all. The argument of counsel, above quoted, was not supported by any evidence, was inexcusable, and highly improper, and was made for the apparent purpose of inflaming the minds of the jury against the defendant Erickson. It had nothing to do with any issue before the court. The record indicates that while counsel for the defendant attempted to object, and did object, in order to protect his record in this regard, the court paid no attention to his objections.

The judgment of the Circuit Court of Cook County is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

HEBEL AND DENIS E. SULLIVAN, JJ. CONCUR.

" r. Hunter: Well, you are not [illegible] to be jooled. However, the accident [illegible] to blame, he says. [illegible] why, you see know the answer - politics - just [illegible] as he holds that gets the school [illegible] why he is in the laundry business. [illegible] in this one we find is not terrible, it [illegible] Mr. Hitchcon has a very convenient memory. [illegible] education belongs this; you [illegible] election, and just try to get one [illegible] forgot about the [illegible]."

The evidence in this case [illegible] should have been carefully and [illegible] submitted it all. The argument of counsel, [illegible] supported by any evidence, and [illegible] and was made for the purpose of inflaming the minds of the jury against the defendant Hitchcon. It has nothing to do with the issue before the court. The report is [illegible] for the defendant [illegible] protest his record in this regard, the court [illegible] his objections.

The judgment of the circuit court [illegible] reversed and the cause is remanded [illegible].

[illegible]

HERRI AND DEAN v. [illegible], [illegible] .

39997

ELIZABETH POZNANIAK, individually and as Administratrix of the Estate of Mary-Anna Wnukowski, Appellee, v. STANISLAW WEBER and MAX S. WEBER, heretofore trading as WEBER AND WEBER and OFFICES OF MAX S. WEBER, Appellants.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

297 I.A. 033

MR. PRESIDING JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

By this appeal defendants seek the reversal of a judgment against them for the sum of $4,200.00, entered in the Municipal Court of Chicago on the verdict of a jury. The action is based upon the following document:

"OFFICES OF
MAX S. WEBER
MONEY TO LOAN

N. . No. 3020
Original
Chicago, Illinois July 26, 1924.

Foreign Exchange and Currency
Steamship Tickets via all Best Ocean Lines
Railroad and Ocean Passengers Transfer Service
Baggage, Tourists and Travelers Insurance.

LIBERTY - VICTORY BONDS BOUGHT
Gold Mortgages & Bond Investments
Insurance
Legal Papers Drawn Abstracts Examined
2132 North Western Avenue
Chicago, Illinois
Phones: Humboldt 4578 and 7100

$4200.00

Received from Ignatz & Maryanna Wnukowski, 3404 North Karlov Ave., Chicago, the sum of Forty-two hundred ($4200.00) Dollars to be invested by us to bear you interest at 6-1/2% per annum payable semi-annually and the principal sum to be paid on December 19th, 1925.
Adjusted by - - - - - - - - - Approved - - - - - - -
OFFICES OF MAX S. WEBER
per Max S. Weber,
Dept. Head

Not Negotiable
Not subject to Check or Draft "

On the back of this document there appears the following:

"I hereby assign the interest in this note to my son
Antonie Wnukowski
(signed in long hand) Ignatz Wnukowski
For value received I hereby assign all of my right,
title and interest in and to the within claim to
Elizabeth Poznaniak

Antonie Wnukowski
Ignatz Wnukowski (signed in long hand)"

The record indicates that the title to this instrument is in plaintiff, and no question is raised as to plaintiff's title thereto. Defendants insist, however, that the evidence fails to sustain plaintiff's contention that the defendants are, or that either of them is, liable thereon. The claim of the plaintiff is that Stanislaw Weber and Max S. Weber are liable as partners.

As a witness for the plaintiff, Max S. Weber testified that on July 26, 1924, he received from Ignatz and Maryanna Wnukowski the sum of $4,200.00, mentioned in the document referred to, that he did not at any time return to either of them any portion of the $4,200.00 mentioned, and that he had not paid any interest on the money since its receipt by him.

Stanislaw Weber, the father of Max S. Weber, testified that he is the owner of the building located at 2132 North Western Avenue in the city of Chicago; that he had never been in the mortgage, investment, insurance or real estate business, and that he never was in business with his son, Max S. Weber; that he had known Ignatz Wnukowski for 35 years, and that he had had some business dealings with him in connection with a grocery store which he conducted and where Wnukowski was one of his customers, but that he never had any dealings with him in connection with investing money; that he had no conversation with Wnukowski on July 26, 1924. On cross-examination, he stated that in July, 1924, his son was conducting a business at 2132 North Western Avenue; that on his son's place of business, there was a sign which read:"Weber and Weber". This witness also

"I hereby [illegible]
[illegible] Maxwell
(signed) [illegible]
for value received, I do hereby [illegible]
title [illegible]
Elizabeth [illegible]

[illegible] Maxwell
[illegible]

The [illegible]

in [illegible]

thereto. [illegible]

sustain [illegible]

either of them [illegible]

that [illegible]

As a [illegible] the [illegible]

on July 26, 1924, [illegible]

the sum of [illegible]

he did not [illegible]

[illegible]

money alone [illegible]

[illegible]

he is the [illegible]

in the city of [illegible]

investment, [illegible]

in [illegible]

[illegible] for [illegible]

with the [illegible]

[illegible]

[illegible]

conversation with [illegible]

he [illegible] in July, 192[illegible]

[illegible]

there [illegible]

stated that he had done work in this office, but only as a janitor in the care of the building, and that he had never seen either of the Wnukowskis at any time between the years of 1910 and 1933.

In his own behalf, Max S. Weber testified to the effect that he was in the business of selling real estate and insurance; that at the time the document referred to was executed, he was in such business, with his office located at 2132 North Western Avenue, and that he had one sign with his own name in front of the building; that he had known the Wnukowskis for 15 or 18 years prior to July, 1924; that about two weeks prior to July 26, 1924, these people came to his office at 2132 North Western Avenue and requested the witness to collect a certificate of deposit for $4,200, which he did, and received the money; that the money was paid him through the First National Bank of Chicago, that immediately upon its receipt, he notified the Wnukowskis, and that they came to his office on July 26, 1924, and that they then received the amount of $4,200.00 in cash from the witness and left his office; that shortly thereafter they returned to his office and Ignatz Wnukowski told the witness that they had no need for the money for at least two years, and that they requested him to invest it for them; that he there and then made several suggestions as to how the money should be invested, and that thereafter he invested the money in property located at 2417-19 West Fullerton Avenue in the city of Chicago. He admitted that at that time, the business was conducted under the name and style of "Weber and Weber", but that he insisted his father was never connected with it. This witness further testified that about six months after July 26, 1924, Wnukowski demanded interest on the $4,200.00 from the witness; that Wnukowski was then informed by the witness that the flats in the building at 2417-19 West Fullerton Avenue were vacant, and that there was no money from which he could pay the interest; that

stated that he had done work in that office, but [illegible]
in the case of the building, [illegible]
the Hudowski at any time [illegible]

In his own behalf, [illegible]
that he was in the habit of [illegible]
that at the time the documents [illegible]
such business, [illegible]
and that he had one [illegible]
that he had known the Hudowski [illegible]
1924; that about two weeks prior to July 1, [illegible]
came to his office at 127 North [illegible]
witness to collect certificates of deposit for [illegible]
and received the money; that [illegible]
First National Bank of Ohio, [illegible]
he notified the witness, and that they came to [illegible]
July 26, 1924, and that they then received the [illegible]
in cash from the witness and left the office; that shortly [illegible]
they returned to his office [illegible]
that they had no need for the money [illegible]
they requested him to invest it for them; that [illegible]
made several suggestions as to how [illegible]
that thereafter he invested the money in property located [illegible]
West Bulleyton Avenue in the city [illegible]
that time, the business was conducted [illegible]
"Weber and Weber", but the [illegible] be instated
This witness further testified [illegible]
1924, Hudowski [illegible]
that Hudowski [illegible]
the building [illegible]
there was no money from which he [illegible]

Wnukowski then stated to the witness that the property was not a good investment; that the witness told Wnukowski that it was the best investment that could have been made for him, and that Wnukowski thereupon replied, in substance, that in spite of the fact that the investment was worthless, that he believed that Weber had done the best he could in investing the money.

The record shows that neither Weber nor Wnukowski ever had title to the property in question; that an uncle of Max Weber had a contract for its purchase, and except the word of Max Weber, there is nothing in the record to show that any of the money delivered to him was ever invested in any property or in this contract. Frank S. Piechocki, uncle of Max Weber, and the person to whom Weber testified he paid the money, was not produced as a witness, and his absence was not explained.

We are satisfied that the jury was justified in concluding that the $4,200.00 delivered by Ignatz and Maryanna Wnukowski, and for which they received the document sued on, was appropriated and was not invested as Max Weber represented. The only question which is to be considered, is whether or not a partnership existed between Max Weber and his father at the time in question. It is in evidence that about the time of the transaction in question, other persons had real estate and investment business with the two Webers at the place of business where Max Weber said he operated. Max Weber testified that there were no other Webers extant having any relationship with either of the two defendants, or with the business. It is also

[illegible] good investment; it [illegible] the best investment to [illegible] therefore replied, in [illegible] investment was worthless, [illegible] best he could in investing the money.

The record shows that [illegible] had title to the property in [illegible] had a contract for the purchase, [illegible] there is nothing in the record [illegible] to him was ever invested in any [illegible] 2. Plaintiff, upon [illegible] testified he told the agent, [illegible] absence was not [illegible].

To rebut [illegible] that the [illegible] for which they received the [illegible] was not invested in [illegible] is to be considered, in [illegible] Mr. Rober and his father [illegible] that about the time of the transaction [illegible] real estate and investment [illegible] of business where Mr. Rober [illegible] that he [illegible] either of the two [illegible]

shown that either, or both, of the defendants issued printed advertisements of the business conducted at 3132 North Western Avenue, bearing the name "Weber and Weber" thereon. We are not prepared to hold that the jury was not justified in returning the verdict on which the judgment was entered.

The judgment of the Municipal Court of Chicago is, therefore, affirmed.

JUDGMENT AFFIRMED.

HEBEL, J. AND DENIS E. SULLIVAN, J. CONCUR.

shown that [illegible]

advertisement [illegible]

Avenue, [illegible]

prepared to [illegible]

verdict [illegible]

therefore, [illegible]

HEBER, [illegible]

40023

MARGUERITE LAMBERT,

Appellee,

v.

WILLIAM H. SPIKINGS, et al.,

On Appeal of WILLIAM H. SPIKINGS,

Appellant.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

297 I.A. 634

MR. PRESIDING JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal, by defendant, William H. Spikings, from a decree of sale entered in a foreclosure proceeding in the Superior Court of Cook County on November 16, 1937, by which, as the notice of appeal recites, defendant prays that "said decree be vacated and said cause be remanded for the entry of an appropriate decree." The errors relied upon for reversal are as follows:

> "1. The evidence concerning the charges for foreclosure minutes, for stenographic charges and for photostatic copies was inadequate, and the Court erred in allowing said charges to plaintiff.
>
> "2. The Master's certificate of services rendered by him was inadequate, and the Court erred in allowing the Master's fees herein, in the absence of a proper and sufficient statement of such services."

In reply to defendant's contention, plaintiff insists that no objection to the Master's fees appears in the record, and that therefore the question of improper specification of fees cannot be considered here. In support of her position, she cites the case of Eulette v. Zilske, 232 Ill. App. 128, where this court said:

> "It is contended that the master's fees were not properly itemized. No objections or exceptions were made on that subject. The contention is therefore untenable."

There is no showing in the record that any objections or exceptions were made to the Master's report with respect to

the matters set forth by defendant as his grounds for reversal, except as shown by the order entered by the court on November 16, 1937, as follows:

> "On Motion of Solicitor for William H. Spikings, defendant, it is ordered that the objections to the Master's Report herein filed by said defendant, be and they are hereby ordered to stand before this court as exceptions to said Master's Report on behalf of said defendant.
>
> And this cause coming on now to be heard upon said exceptions and upon the objections of said defendant to the Master's fees as requested by the Master herein.
>
> It is ordered that said exceptions and objections, and each of them, be and are hereby overruled."

What these objections and exceptions were, does not appear.

The decree of the Superior Court of Cook County appealed from, is affirmed.

Decree Affirmed.

HEBEL, AND DENIS E. SULLIVAN, JJ. CONCUR.

the [illegible]

except [illegible]

1927, [illegible]

"[illegible]
defendant, [illegible] to the [illegible]
report [illegible]
ordered [illegible]
Master's [illegible]
[illegible]
exceptions [illegible]
Master's [illegible]
[illegible]
and [illegible]"

What these objections [illegible], does not appear.

The [illegible]

from, is [illegible].

[illegible]

HEBBL, [illegible]

40078

PEOPLE OF THE STATE OF ILLINOIS,) APPEAL FROM

Appellant,)

v.) MUNICIPAL COURT

EMIL J. CHARBONNEAU,) OF CHICAGO.

Appellee.)

297 I.A. 634

MR. PRESIDING JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

On November 2, 1937, an information was filed in the Municipal Court of Chicago in which it was charged that Emil J. Charbonneau on October 23, 1937, had unlawfully, with intent to cheat and defraud by means of false pretenses, to-wit: by means of a false and bogus check, obtained from Louis A. Hanel money, to-wit: $100.00, lawful money of the United States, the property of the said Louis J. Hanel, with intent then and there to cheat and defraud Hanel in violation of the statute. The information was signed and sworn to by Hanel. On the same date, after a hearing before the court without a jury, the court found the defendant guilty of the charge contained in the information, and he was sentenced to confinement at hard labor in the House of Correction for a term of 60 days, and fined one dollar and costs. Thereafter, on November 2, 1937, the court ordered the bailiff to take the defendant from the bar of the court and deliver him to the superintendent of the House of Correction, which was done.

On November 23, 1937, after a hearing upon a petition theretofore filed by the defendant, the court ordered that a new trial be granted, and that the cause be set for trial for December 1, 1937. The petition of the defendant upon which the new trial was granted alleged, in substance, that at the hearing of the cause at which the defendant had been found guilty, as charged, defendant was not represented by counsel, and that he did not have an opportunity to engage counsel; that through an excusable mistake

of fact and ignorance, and without negligence on the part of the defendant, he pleaded guilty to the charge contained in the information; that defendant had no opportunity to consult counsel so that he could be fully advised as to his rights; that at the time of the trial the defendant was not guilty of the crime contained in the information, and that if he had been given the right to examine the information and retained counsel, he would have prayed the court to present his full defense and to offer mitigating evidence, unknown to him at the time. On November 23, 1937, the court ordered that the superintendent of the House of Correction produce the defendant before the court on the first day of December, 1937. The record indicates that on the last mentioned date no evidence was heard and without anything before the court other than the petition mentioned, the court granted a new trial and again found the defendant guilty as charged in the information, and ordered him to make restitution of the sum of $65.00 at the rate of $5.00 per month, and that the defendant was thereupon released upon the signing of an individual recognizance of $500.00.

The procedure adopted in this case has been fully discussed, reviewed and criticized in the case of People v. Du Bois, 293 Ill. App. 498, where this court held, among other things, that Section 21 of the Municipal Court Act, the section under which the petition in the instant case was filed, does not give the Municipal Court power to order a new trial under any circumstance, after the prisoner had begun serving his sentence.

The judgment of the Municipal Court is reversed and the cause is remanded with the direction that the court order the remandment of the defendant to serve out the sentence originally imposed.

REVERSED AND REMANDED WITH DIRECTIONS.

HEBEL AND DENIS E. SULLIVAN, JJ. CONCUR.

of fact and law [illegible]

defend [illegible]

tion; in [illegible] to consent [illegible]

that he [illegible] any; but in the time

of the trial [illegible] of the crime contained

in the indictment, [illegible] the right to

examine the indictment [illegible] be [illegible] yet

the court [illegible] or waive trial

evidence, [illegible] the

court [illegible]

produce [illegible]

December, 1[illegible]

date no [illegible] the court

other than [illegible]

and again [illegible] in the information,

and [illegible]

rate of [illegible]

released upon [illegible]

reviewed [illegible] v. [illegible], [illegible]

App. 6[illegible]

21 of the [illegible]

in the [illegible]

power to [illegible]

prisoner [illegible]

[illegible]

cause in [illegible]

ment of the [illegible]

HAZEL [illegible]

40005

BEULAH WHITEHOUSE,
(Plaintiff) Appellee,
v.
FRED WHITEHOUSE,
(Defendant) Appellant.

APPEAL FROM
SUPERIOR COURT
COOK COUNTY.

297 I.A. 634

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from an order denying the defendant leave to file a bill of review. The defendant filed his petition, after due notice to the plaintiff, on November 4, 1937, which was eleven years after the decree was entered, wherein he prayed for leave of court to file a bill of review of a decree of divorce entered in the cause on July 10, 1926. The petition alleged that the plaintiff filed her bill for divorce on April 1, 1926, that summons issued and was returned with the endorsement by the Sheriff that the defendant was not found in the county; that plaintiff filed an affidavit of non-residence, stating that the last known address of defendant was Camper, Canada, Province of Manitoba; that publication was made in the Chicago Law Bulletin; that on May 6, 1926, a default of the defendant was entered of record; that on July 10, 1926, the cause was heard as a default by the court and a decree was entered on said date granting the plaintiff a divorce and the right to resume her maiden name; that the decree of divorce was predicated upon testimony of the plaintiff, Lillian Getshinger and Suzan Bingham, all of which testimony with respect to defendant's deserting the plaintiff is denied by the defendant and alleged to be perjured; that the defendant further denies the witnesses, Lillian Getshinger and Suzan Bingham ever visited the plaintiff and the defendant while they lived together as man and wife, or that said witnesses ever were acquainted with the defendant; that the defendant had no notice of the pendency of the

40008

BETWEEN: [illegible]

(Plaintiff) [illegible]

v.

[illegible]

(Defendant) [illegible]

[illegible]

[illegible]

[illegible]

[illegible] on or after [illegible] the defendant [illegible] of [illegible]. The defendant filed his petition, [illegible] the [illegible], on November [illegible], 1927, which was [illegible] years after the decree was [illegible], seeking to be [illegible] for leave of [illegible] to file [illegible] petition of [illegible] of divorce [illegible] on May 15, 1928. The petition alleged that [illegible] for [illegible] in 1928, that [illegible] with the [illegible] by the [illegible] in the county; that plaintiff [illegible] of non-residence, at time that the last known [illegible] was [illegible], under provision of Manitoba; that [illegible] in the [illegible] that on [illegible], last but of the defendant was [illegible] of record; that [illegible] the [illegible] by the court [illegible] and [illegible] granting the [illegible] divorce [illegible] to return [illegible] decree of divorce [illegible] corroborated upon testimony of the [illegible] filing [illegible] own [illegible], all of which testimony with respect to [illegible] the [illegible] by the defendant [illegible] to [illegible]; that the defendant further denies the [illegible] and [illegible] and [illegible] over visited the plaintiff [illegible] but while they [illegible] to other [illegible] and wife, [illegible] associated with the defendant; the [illegible] had no notice of the pendency of the

suit, either by personal service or by mail, that the defendant admitted separating from the plaintiff in the month of September, 1921, but alleged the cause of the separation was that plaintiff was living in an open and notorious state of adultery with divers men; that subsequent to such separation plaintiff admitted her misconduct and told the defendant she had contracted a venereal disease for which she was undergoing treatment from a physician; that defendant contributed money to the support of the plaintiff and about that time was willing to forgive plaintiff and to resume their marital relationship and had sent her money expressly for the purpose of resuming such relations.

The matter was heard by the court on motion of the defendant for leave to file a bill of review, and defendant's right to file said bill of review was denied, as herein stated.

The defendant makes two points: first, that the court erred in denying defendant leave to file a bill of review on the ground that a bill of review lies for an error of law apparent on the face of the record; second, that the court erred in denying leave to the defendant to file his bill of review on the ground that the hearing of the original bill for divorce as a default matter was a manifest error in law in that no proper default was ever made by the defendant. So, the question before the court on this appeal is whether the court erred in refusing to permit the defendant to file his bill of review for error apparent on the face of the record and for error in that no proper default was entered of this defendant.

By his contention the defendant admits, a default was entered, but suggests it was not a proper one. This being the only question argued the defendant has waived the right to dispute the facts alleged in the petition as to whether the testimony of witnesses was perjured and the plaintiff was guilty of certain indiscretions mentioned in the petition.

suit, [illegible]

admitted [illegible]

1921, but [illegible]

was liable in [illegible]

men; the [illegible]

misconduct [illegible]

disease for [illegible]

that determin[illegible]

and about [illegible]

their [illegible]

purpose of [illegible]

[illegible]

defendant for [illegible]

to file [illegible]

[illegible]

in denying [illegible]

a bill or [illegible]

the record; [illegible]

defendant [illegible]

of the origin[illegible]

error in [illegible]

So, the [illegible]

court erred [illegible]

review [illegible]

that no [illegible]

[illegible]

entered, [illegible]

question [illegible]

facts [illegible]

witnesses [illegible]

indications [illegible]

We will consider the question of whether the court entered the default of this defendant prior to the hearing on the bill of divorce.

The record shows the summons was issued and the Sheriff returned the same with the notation that the defendant was not found in the county. Then the affidavit of the plaintiff of non-residence was filed, stating the last known place of residence of the defendant. The certificates of mailing and publication of notice also appear in the record, and the court on May 6, 1926, after the defendant had been duly notified of the pendency of the cause by publication and notice, and by the mailing of the same, pursuant to statute, ordered that the defendant be required to plead, answer or demur instanter to the bill of complaint, and no plea, answer or demurrer having been interposed by the defendant and he having made default, his default was, on motion, ordered to be taken and was entered of record. The court further ordered that the bill of complaint be taken pro confesso by and against the defendant for want of his answer thereto.

We are all familiar with the rule that all orders appearing in the record of the Superior Court of Cook County are presumed true, correct and reflect verity. The defendant contends that -

> "No memorandum of defendant's default was authorized and the matter contained on page 15 of the record has been an unlicensed and unwarranted action by the Clerk of the Superior Court."

However, there is nothing in the record which would indicate that this action by the Clerk in entering default of the defendant was not warranted, for the court in disposing of the case acted in the matter, and no doubt the orders were entered as directed by the court.

From the record it appears that the defendant was properly defaulted and the court entered a decree based upon the evidence presented. That being the fact, the court in the instant case was full justified in denying leave to the defendant to file his bill of review.

ORDER AFFIRMED.

HALL, P.J. AND DENIS E. SULLIVAN, J. CONCUR.

40018

HARRY VASELS,

(Plaintiff) Appellant,

v.

THE PEOPLES GAS LIGHT & COKE COMPANY, a corporation,

(Defendant) Appellee.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

297 I.A. 634

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from an order entered by the Court striking plaintiff's replication to the defendant's additional answer and dismissing the suit.

This action was one brought by the plaintiff against the defendant to recover damages for malicious prosecution. The case was tried before a jury and after hearing the evidence and the instruction of the court the jury retired and considered the facts as they appeared from the evidence, and returned a verdict finding the defendant guilty and assessing plaintiff's damages at $5,000.

The material allegations of the plaintiff's complaint are that the defendant without any reasonable or probable cause, maliciously and for the purpose of injuring the plaintiff caused the arrest and imprisonment of the plaintiff pursuant to a warrant issued in the Municipal Court at the request and upon the signed complaint of the defendant's agent.

Further, that upon the trial of the criminal charge the court determined that the defendant (the plaintiff here) was not guilty of the offenses charged, and caused him to be discharged from custody and fully acquitted.

The usual allegations of damages were made, with the special allegation that the plaintiff was operating a retail department store, and that as a result patrons refused to trade with

him, and that his income had been greatly reduced and impaired.

The defendant's answer to the complaint consisted of a general denial, also that it acted in good faith and upon the advice of reputable counsel at the time of the filing of an affidavit and the issuance of the warrant by the court.

As we have already indicated, the case was tried and the jury returned a verdict finding the defendant guilty and fixing plaintiff's damages at $5,000. After the verdict the defendant filed an amendment to its answer theretofore filed, denying that the Judge of the Municipal Court adjudicated and determined that the plaintiff was not guilty of the offense charged, and further denying that the court discharged the plaintiff fully, or acquitted him of said offense.

In the instant case a new trial was allowed by the court. Thereafter the defendant filed an additional answer in this proceeding as a bar to the prosecution of the malicious prosecution suit, setting out the order of the judge of the Municipal Court, which order is in words and figures as follows:

> "Now come the people by the State's Attorney and the defendant, Harry Vasels, alias John Doe, as well in his own proper person as by counsel also comes, and thereupon the defendant moves the court to suppress the evidence, and the court being fully advised in the premises, sustains said motion, and defendant discharged."

Defendant further answered that no verdict of acquittal was entered and that the defendant, the plaintiff here, demanded as a right that the evidence be suppressed and that the defendant be discharged from prosecution.

It was further called to the attention of the court that the defendant procured his discharge and avoided a judicial investigation on the question of his guilt or innocence; that he secured his discharge by reason of his act, trick or device; that when the case was called, Vasels, by his attorney, stated to the court that

him, and [illegible] ly reason [illegible],

the [illegible] the concluding [illegible] of

general [illegible] [illegible] the view

of reputable [illegible] [illegible] it was

the issuance [illegible].

[illegible] and the

jury returned a verdict [illegible] guilty [illegible] finding

plaintiff's [illegible] the [illegible] amount filed

an amendment to the [illegible] rules, requiring the judge

of the municipal court [illegible] the plaintiff

was not guilty of the [illegible] charge, [illegible] saying that

the court disregarded the [illegible] guilty, [illegible] old of said

offense.

In the [illegible] by the court.

Therefore the [illegible] in this [illegible]

as a bar to the [illegible] of [illegible] and [illegible]

out the or [illegible] the [illegible], [illegible] in

in words and [illegible]:

> "Now come [illegible] Harry Vasser, [illegible] defendant herein, and by counsel [illegible] the statement [illegible] the court to [illegible] and [illegible] court being truly advised in [illegible] defendant discharged."

Defendant thereupon [illegible] motion [illegible] was entered

and that [illegible] the

the evidence [illegible] from

prosecution.

[illegible] that

the defendant [illegible] investigation on the [illegible] of his guilt or innocence; that he assumed

his discharge by [illegible] order or verdict; that when the

case was [illegible] by his attorney, stated to the court that

the Gas Company unlawfully entered the premises on Madison Street, and took fixtures without a search warrant; that when the case was heard before the court and the jury, the plaintiff in the malicious prosecution action testified the Gas Company did not take fixtures from his premises, and that the Gas Company had not been in his premises, and therefore the defendant prays that the plaintiff should not be permitted to prosecute his action, to which answer the plaintiff filed a replication alleging that the prosecution was terminated by acquittal, admitting the entry of the order by the court, and alleging that the defendant did not prosecute its complaint, and further that the Gas Company offered no evidence when the case was called for trial, and stated before the court that it had no evidence other than pipes that it obtained in the premises of the plaintiff; that upon the representation made by the Gas Company, defendant's counsel moved to suppress the evidence; that upon the motion being sustained, the Gas Company stated it had no other evidence; that upon such statement the court discharged and acquitted the defendant, and that the Gas Company knew at the time of making the complaint that it had no evidence, and obtained the warrant maliciously, without reasonable or probable cause.

After consideration by the court the replication was stricken upon defendant's motion and plaintiff's cause was dismissed. So that from the record itself we find that a warrant was issued by the Municipal Court upon the presentation of the affidavit for that purpose, and when the cause was reached for trial no evidence was offered in support of the charge that the plaintiff did with intent to injure and defraud The Peoples Gas Light & Coke Company, who was engaged in the manufacture and distribution of illuminating gas in the City of Chicago, Illinois, make or cause to be made with a gas pipe or pipes in the premises known as 1035-1037 West Madison

the Gas Company [illegible] entered its premises on a dispute arrived and took fixtures already [illegible] that when the case was heard before the court [illegible] the jury, the plaintiff in the malicious prosecution action [illegible] the gas company did not take fixtures from his premises, in fact the [illegible] not even in his premises, and therefore the defendant [illegible] that the plaintiff should not be permitted to [illegible] action, to which answer the plaintiff filed a replication alleging that the prosecution was terminated by nonsuit, claiming [illegible] injury of the order by the court, and alleging that the [illegible] it did not prosecute its complaint, and further that the [illegible] company offered no witness when the case was called for trial. [illegible] before the court that it had no evidence other than [illegible] in the premises of the plaintiff; that [illegible] by the Gas Company, which [illegible] to explain the evidence; that upon the motion [illegible] it had no other evidence; that [illegible] and acquitted the defendant, and [illegible] do [illegible] the time of making the complaint [illegible] and obtained the warrant maliciously, without reasonable or probable cause.

After consideration by the [illegible] the action was stricken upon defendant's motion and judgment [illegible] was dismissed. So that from the record [illegible] find that [illegible] issued by the Municipal Court [illegible] for the purpose, and when [illegible] the evidence was offered in support of the [illegible] with intent to injure and defraud the [illegible] Gas Company, who was engaged in the manufacture and distribution of illuminating gas in the City of Chicago, Illinois, gave or cause to be made with a gas pipe or pipes in the premises known as 1328-1329 West Madison

Street, City of Chicago, County of Cook and State of Illinois, a connection or connections so as to conduct and supply illuminating or inflammable gas to the burners, orifices, lamps or other machines and appliances in the premises, from which such gas ~~tas~~ to be consumed without first passing through or being registered by a meter, and without the consent of The Peoples Gas Light & Coke Company.

From an examination of the pleadings in this action, and without going into too much detail with reference to the evidence, we believe the court erred in striking the replication of the plaintiff to the amended answer filed after the motion for a new trial was allowed, and thereby dismissing the plaintiff's cause of action.

The point raised and largely relied upon is that the defendant in the criminal action (the plaintiff here) was not acquitted prior to the institution of the suit to recover damages for malicious prosecution. The Municipal Court, on motion of the attorney for the plaintiff (the defendant in the criminal case) did strike the evidence that had been submitted, and in doing so, the defendant not offering any further or other evidence, discharged the plaintiff. There was nothing before the court which would justify a conviction, and if the attorney had insisted upon a motion to discharge, no doubt after the statement was made by the defendant gas company that it had no evidence to offer, the court would have discharged the plaintiff, and it seems to us that this would entitle the plaintiff to maintain an action for malicious prosecution.

While numerous cases have been called to our attention by both sides as to what in effect constitutes a final order, these cases do not militate against what is said by this court, in that there was a final order entered in the criminal action, and there is no need for us to distinguish between the several cases cited.

street, at [illegible] of [illegible],
connection [illegible] in the air
or inflow [illegible]
machines [illegible] upon or was [illegible]
be commenced [illegible]
a meter, on [illegible] [illegible]
Company.

[illegible]
without going into too [illegible] evidence,
we believe the jury [illegible]
tiff to the amended [illegible]
was allowed, on theory [illegible] action.

The court [illegible]
defendant in the trial [illegible] not
committed error in [illegible] a verdict
for malicious [illegible], in [illegible] of the
attorney for [illegible]
strike the [illegible] Also so, the
defendant not [illegible] evidence, discharged the
plaintiff. [illegible]
a conviction, [illegible] to
discharge, [illegible]
gas com any [illegible]
discharged the [illegible] and [illegible] the [illegible]
the plaintiff [illegible]

[illegible]
both sides [illegible] by
cases do not [illegible]
there was [illegible]
is no need [illegible] discussed.

As we have stated before, we are of the opinion that the court erred in striking the replication of the plaintiff and dismissing plaintiff's action.

The judgment for the defendant is reversed and the cause remanded.

REVERSED AND REMANDED.

HALL, P.J. AND DENIS E. SULLIVAN, J. CONCUR.

40043

ROCKFORD STEEL FURNITURE COMPANY, a corporation, and A. J. Strandquist, Assignee of ROCKFORD STEEL FURNITURE COMPANY, a corporation,

(Plaintiffs) Appellants,

v.

PHILIP HOFFBERG, MADISON & KEDZIE STATE BANK, a corporation, as Trustee, EMANUEL LESSER, Intervening Petitioner, et al.,

(Defendants) Appellees.

APPEAL FROM SUPERIOR COURT COOK COUNTY.

297 I.A. 635

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

On August 28, 1928, the plaintiff Rockford Steel Furniture Company, a corporation, instituted a suit to foreclose its claim for mechanic's lien. Upon the issues being joined the cause was referred to a master in chancery, and after a hearing, the master filed his report, finding that the plaintiff had a good, valid and subsisting lien for $2083.67, subject to the lien of the first mortgage trust deed to the Madison & Kedzie State Bank, a corporation, as trustee, and, upon the filing of the master's report, a decree was entered ratifying and confirming the master's report of sale. Subsequently, upon issue properly joined, a re-reference was had to the master in chancery, who filed his further report recommending that the lien of the plaintiff be found to be subject not only to the first mortgage trust deed, but also to the second mortgage trust deed. The appeal is from the decree entered on September 24, 1937, and from the supplemental decree of December 3, 1937, and further, from the order which denied leave to A. J. Strandquist, assignee of the Rockford Steel Furniture Company, to be substituted as party plaintiff.

The bill of complaint in this case was filed by the Rockford Steel Furniture Company, a corporation, on August 28, 1928, against Philip Hoffberg and others, to enforce its claim for mechanic's lien

against the property described in the bill of complaint. The bill alleges that on July 18, 1927, Philip Hoffberg, being the owner of the property described in the complaint, and being engaged in the erection of certain improvements upon said premises, entered into a contract with the complainant, the Rockford Steel Furniture Company, a corporation, whereby the complainant agreed to furnish the labor and material necessary for the installation of 41 steel kitchens complete, to be used by said owner in the erection of said improvements thereon; that thereafter on August 24, 1927, the said Philip Hoffberg entered into a contract with the plaintiff, Rockford Steel Furniture Company, a corporation, for certain extra and additional labor and material, to wit: the installation of 58 medicine cabinets; that pursuant to said contracts, the plaintiff, Rockford Steel Furniture Company, a corporation, performed all of the work and labor necessary for the installation of said material and completed said contracts in all respects; that the last work, labor and materials furnished by the plaintiff, Rockford Steel Furniture Company, a corporation, occurred on the 14th day of April, A. D. 1927; that thereafter on May 8, 1928, the verified claim for mechanic's lien was filed in the office of the clerk of the Circuit Court of Cook County, as Document No. 139098, which claim was by reference made a part and portion of this complaint.

To the bill of complaint, the Madison & Kedzie State Bank, a corporation, on October 18, 1928, filed its answer, averring that it was the trustee under the first mortgage trust deed on the property sought to be foreclosed and that its lien was superior to that of the plaintiff. Thereafter, the matter was referred to a master in chancery, and, as we have already indicated, during the course of the proceedings, it was pointed out for the first time by the attorneys for the Madison & Kedzie State Bank, a corporation, that the proof as to the time of completion did not conform to the allegations contained in the complaint.

against the [illegible]
alleges th [illegible]
the property [illegible]
erection of [illegible]
a contract [illegible]
Company, a [illegible]
the labor [illegible]
Kitchens Company, [illegible]
improvements [illegible]
Philip Rolfing [illegible]
Steel Furniture Company, [illegible]
additional labor [illegible]
medicine products; [illegible] the plaintiff,
Rockford [illegible] Erected all of the
work and labor [illegible] of material and
completed said contracts [illegible] labor,
and materials furnished by [illegible] Furniture
Company, a corporation, [illegible] of work, . .
1927; that [illegible] for reasonable
lien was filed [illegible] amount of
Cook County, [illegible]
made a part [illegible]

To the [illegible] Illinois State [illegible],
a corporation, on [illegible] recovering the
it was the [illegible] based on the property
sought to be [illegible] the [illegible] of the
plaintiff. [illegible] matter of discovery,
and, as [illegible] proceedings,
it was [illegible]
Madison [illegible] for the
time of [illegible] as to the
[illegible] contained in
the complaint.

On October 31, 1930, the plaintiff, by leave of court, filed an amendment to the bill of complaint, which struck out the words "14th day of April, 1927" wherever the same appeared in the complaint, and substituted therefor the words, "the 14th day of April, 1928".

On November 3, 1930, the Madison & Kedzie State Bank, a corporation, as trustee, withdrew its original answer and filed in its stead another answer to the complaint setting forth that the complainant's lien was defective for the reason that the original bill of complaint did not allege the fact that the claim was filed within four months from the 14th day of April, 1927, the date alleged in the original bill as being the date of completion.

On September 10, 1937, A. J. Strandquist, filed his petition for leave to be substituted as party plaintiff, without prejudice to any of the proceedings theretofore had, to which petition, a motion to strike was filed by the defendant Madison & Kedzie State Bank, as trustee, and on September 20, 1937, an order was entered denying the motion of A. J. Strandquist.

From the report of the master it appears that the first contract of the Rookford Steel Furniture Company, was entered into on July 18, 1927; that the contract for the extra material and supplies was entered into on August 24, 1927, and that the work was completed on the 14th day of April, 1927; that on the 8th day of May, 1928, the complainant filed its verified claim for mechanic's lien in the Circuit Court of Cook County. Notwithstanding these findings of fact, the Master found that inasmuch as the original bill of complaint set forth the date of April 14, 1927, as being the date of completion, the original bill of complaint did not properly plead a cause of action.

On [illegible], [illegible], [illegible], by [illegible] of court, filed an amendment [illegible] which altered the words "like [illegible]" [illegible] appeared in the complaint, [illegible], the 14th day of April, 1922.

In November [illegible] corporation, [illegible] lien of and another [illegible] the complainant's [illegible] bill of complaint [illegible] filed within four months [illegible], 1922, the alleged in the original bill [illegible] constituted.

On [illegible], 1922, [illegible] filed his petition for [illegible] liability, without prejudice to any of the [illegible], to which petition, a motion to strike [illegible] Bank, as trust[illegible], [illegible], to order [illegible] denying the [illegible].

From the [illegible] that the first contract of the complainant [illegible] was entered into on July 18, 1922; [illegible] and supplies were [illegible], 1922, [illegible] completed on the [illegible] on the 4th day of May, 1923, the [illegible] claim for mechanic's lien in the [illegible] filing of the original bill of complaint [illegible] 1922, [illegible] the date of [illegible] and not properly [illegible].

The court, however, entered the decree on September 24, 1937, confirmed and reiterated the findings of the Master, and adopted his recommendation that the lien of the plaintiff be found to be subject to the lien of the first mortgage trust deed.

Thereafter the Master filed a supplemental report, finding that the lien of the plaintiffs was also subject to the second mortgage trust deed, which report was confirmed by a supplemental decree entered on December 3, 1937.

The claim for lien, which is the subject of this litigation, was filed on May 8, 1928, and alleged that the last work was completed on February 20, 1928. The bill of complaint filed on August 28, 1928, alleged that the contract was entered into on July 18, 1927, and that the last work was completed on April 14, 1927, and incorporated the claim for lien into the bill by reference to its document number.

It is apparent from the pleadings and the record as it appears in this court that since the first contract was entered into on July 18, 1927, certainly the work could not have been completed on April 14, 1927, which was four months before the contract was entered into. It is obvious from the facts in the record that the alleged date of completion, April 14, 1927, was a clerical error. It appears, however, that the claim for lien alleged the date of completion as being February 20, 1928, and is part and portion of the allegations of the complaint, for the reason that it is incorporated by reference in the complaint by the description of its recorded document number. The claim for lien allegation as to the date of completion, therefore, displaces the erroneous allegation, that is, April 14, 1927, in the bill.

The general rule is that courts of equity in order to further the ends of justice treat the clerical error as surplusage and give effect to the allegations which would preserve the equity in the bill. The complaint would then allege that the work was

[illegible]

1927, [illegible]

adopted [illegible]

to be [illegible]

[illegible]

that the [illegible]

mortgage [illegible]

decree [illegible]

[illegible]

was filed [illegible]

on February [illegible]

alleged that [illegible]

that the [illegible]

the claim [illegible]

It is [illegible]

appears in [illegible]

on July 1[illegible]

on April 1[illegible]

entered [illegible]

[illegible]

It appears, [illegible]

[illegible]

the claim [illegible]

[illegible]

recorded [illegible]

date of [illegible]

that [illegible]

[illegible]

further [illegible]

and [illegible]

in the [illegible]

completed on February 20, 1928, and the claim for lien filed within four months thereafter, to-wit: May 8, 1928.

In the recent case of Brandenburg v. Melvin, Opinion No. 36640 of this court, an unreported decision rendered on November 21, 1933, Brandenburg Company filed its bill to foreclose a mechanic's lien on December 28, 1929. On October 17, 1930, by leave of court, Hollister Company filed an answer and intervening petition. The intervening petition alleged that on March 12, 1929, the contract was made and that the last work was completed on August 2, 1929; that on April 1, 1930, the claim for lien was filed,

> "a copy of which is hereto attached and marked Exhibit 'B' and made a part of this intervening petition."

It appears the claim for lien averred that the last work was completed on March 8, 1930. On November 16, 1932, Hollister Company, by leave of court, filed an amended petition alleging that the work was completed on March 6, 1930. Defendant's demurrer to the amended petition was sustained and the petition was dismissed for want of equity. The court held:

> "While in the original petition, filed on October 17, 1930, it is stated that the work of Hollister Company was completed on August 2, 1929, it appears that in its statement of claim for lien * * * it is stated that the work was completed on March 8, 1930. Treating the allegation, as to the completion of the work on August 2, 1929, as surplusage, we are of the opinion that the original petition stated a good cause of action for mechanic's lien. And we are further of the opinion that the amended petition, wherein the statement as to the date of completion of the work is changed from August 2, 1929 to March 8, 1930, is not a statement of a new cause of action."

In the instant case the claim for lien was referred to by its public document number and made a part of the bill. Our attention has been called to the case of Beaudry v. Bell, 250 Ill. App. 468, as being somewhat analogous to the Brandenburg case and the case now at issue. The bill of complaint in Beaudry v. Bell did not allege the date of completion of the work. There was attached to the bill, however, a copy of the claim for lien previously filed with the clerk of the Circuit Court, said claim for lien being incorporated

completed [illegible]

four months [illegible]

[illegible]

[illegible] of this [illegible]

1923. [illegible]

lien on [illegible]

Mollator [illegible]

intervening [illegible]

was made [illegible]

that on April 1, [illegible]

"a copy of which [illegible]

made a part [illegible]

It [illegible]

was completed [illegible]

company, by [illegible]

the work [illegible]

the amount [illegible]

for want of equity. [illegible]

"While in the [illegible] it is stated [illegible] August 1, 1923, [illegible] lien [illegible] 1920. [illegible] work on [illegible] the original [illegible] lien, and [illegible] wherein the [illegible] changed from [illegible] of a [illegible]

In the [illegible] the [illegible] its public [illegible] member [illegible] has been [illegible] in being [illegible] now at issue. [illegible] the late [illegible] however, [illegible] work of the [illegible]

in the bill as an exhibit. The court held that the claim for lien was part of the bill and cured the deficiency on the face of the complaint.

Our attention has been called to the fact that the case in question was dismissed on July 14, 1933 on the general call of the calendar, for want of prosecution. This case has been pending in court for almost five years, having been filed on August 28, 1928. Theretofore the case had been referred to a master in chancery. Evidence was heard by the master and he prepared a report adverse to the claims of the plaintiff, which report bears date October 17, 1931. After the report was prepared the complainant permitted the case to lie dormant for two more years. The term at which the case was dismissed was allowed to expire and many other terms following, when on the 6th day of July, 1934, after the case had been dismissed, the complainant procured an order vacating the order of July 14, 1933, and this order directed that the Chicago Title and Trust Company, a corporation, as Successor Trustee to the Madison & Kedzie State Bank, as Trustee, be substituted as a party defendant.

The defendants urge that after the expiration of the July Term, 1933, the court lost jurisdiction of this cause, and every order made subsequent thereto was null and void, and cite in support of this position the cases of Reynolds, v. Anspach, 14 Ill. App. 38; Lill v. Stookey, 72 Ill. 495; Bill Board Publishing Co. v. McCarahan, 180 Ill. App. 525, Bill Board Publishing Co. v. McCarahan, 180 Ill. App. 539; Sherman & Ellis, Inc. v. Journal of Commerce, 259 Ill. App. 453.

The plaintiffs' reply to the defendants' contention is that when the case was dismissed for want of prosecution on July 14, 1933, it was still pending before the master, and the record shows that a hearing was later had before the master on November 22, 1933; that the rulings of the master on the objections to his report were

in the bill [illegible] for lien
was part of the [illegible] of the
complaint.

Our [illegible]
in question [illegible]
the owner, [illegible]
in court for [illegible] on August 28, 1932.
Therefore the [illegible]
Evidence was [illegible]
to the claim of the [illegible]
1931. After the [illegible] dismissed the
case to file [illegible]
was dismissed [illegible] terms following,
when on the 6th day of [illegible]
the complainant [illegible] dismissed,
and this order [illegible] day of July, 1932,
a corporation, [illegible] a foreign title
bank, as trustee, [illegible]

The defendants [illegible] in the July
Term, 1932, the court [illegible] of every
order made [illegible] in the
of this [illegible] 3;
Lill v. [illegible] 7 [illegible] 180 Ill. [illegible] 180 Ill.
App. 529; [illegible] 452.

The [illegible] to [illegible] is
that when the [illegible] on July 14,
1932, it [illegible] the record shows
that a [illegible] or [illegible] 1932;
that the [illegible] the [illegible] to the report are

not rendered until January 8, 1937.

The attention of the court is further called to the fact that on July 6, 1934, a stipulation was signed by Winston, Strawn & Shaw and A. Edmund Peterson, as attorney for Chicago Title & Trust Co., a corporation, as successor-trustee to the Madison & Kedzie State Bank, as trustee, that the Chicago Title & Trust Co. be substituted as party defendant, and on the same day the court entered the order reinstating the cause and ordered that "Chicago Title & Trust Company a corporation, as successor-trustee to Madison & Kedzie State Bank, as trustee, be substituted as a party defendant herein"; that no steps were taken by the Madison & Kedzie State Bank, one of the defendants, until three years later, when action was taken by it pursuant to notice on June 11, 1937. This defendant presented a petition to the court praying that all orders subsecuent to July 14, 1933, when the order was entered dismissing the case for want of prosecution, be expunged.

Our attention is further called to the fact that the petition did not raise any objection to the right of the Chicago Title & Trust Company to act as successor trustee; in fact, the petition alleged that it was filed on behalf of both the Madison & Kedzie State Bank, as trustee, and the Chicago Title & Trust Co., as trustee. Our attention is called to the fact that in Case No. 39766, which involved the same property as in this case, the abstract therein states that the Madison & Kedzie State Bank closed and resigned as trustee, and that the Chicago Title & Trust Company had become successor trustee.

It would seem that the real party in interest for the defendant was the Chicago Title & Trust Company, and the failure of the defendant Madison & Kedzie State Bank to question the substitution of the Chicago Title & Trust Company as its successor trustee, precluded it from raising any objection to the jurisdiction of the trial court, because it was bound by the stipulation and the order

not read [illegible]

[illegible]

fact [illegible] & Shaw and [illegible] Co., a corporation [illegible] State Bank, as [illegible] affiliated [illegible] the order [illegible] Trust Company [illegible] State Bank, as trustee, [illegible] that no [illegible] the defendants, [illegible] it pursuant [illegible] petition [illegible] 1923, when [illegible] proceeding, [illegible]

[illegible]

petition [illegible] & Trust Company [illegible] the petition [illegible] allowed [illegible] Bank, [illegible] attention [illegible] the same [illegible] the [illegible] that the [illegible]

[illegible]

determination [illegible] the [illegible] of the [illegible] proceedings [illegible] trial court [illegible]

entered in conjunction therewith to the same extent as was the successor trustee.

It is well to have in mind the rulings of the court with reference to the dismissal of a cause upon a general call by the court where it is pending before a master in chancery. In this connection the Supreme Court in Neil v. Mulvaney, 268 Ill. 195, made this statement:

> "Manifestly, neither counsel expected that the cause, after a reference to a master, was to be placed on the regular calendar or that it would be heard until the master had made his report to the court. Clearly, the cause was dismissed because neither the clerk nor the trial court had made any notation on the trial calendar that the case had been referred to a master in chancery. The provision of section 21 of the Practice act of 1907 that 'all causes shall be tried, or otherwise disposed of, in the order they are placed on the docket, unless the court, for good and sufficient cause, shall otherwise direct,' does not affect the situation here. The court had practically otherwise directed by the order of reference, which, beyond question, was overlooked inadvertently by the trial judge in entering the order dismissing the case in the absence of both counsel. The order was erroneous and not void."

This same case was followed by this court in its opinion in the case of Maniatis v. Carelin, 287 Ill. App. 154, but the question that seems to be conclusive in this matter is that when the trial court entered an order after term time vacating the order of dismissal, the remedy of the party objecting thereto is by appeal or writ of error from the judgment upon proper assignment of error in the court of review. Domitski v. American Linseed Co. 281 Ill. 161.

The defendant, Madison & Kedzie State Bank, besides failing to demur or plead to plaintiffs' petition did not appeal from the order, but instead, subsequently, on June 25, 1937, presented an order that the defendants' objections to the master's report stand as exceptions.

So it would seem that the defendants subsequently participated in the trial of the case and waived their right to question the rulings of the court upon the ground that the court in setting aside the judgment of dismissal was without jurisdiction.

entered in [illegible]

successors in [illegible]

It [illegible] with

reference [illegible]

court where it [illegible]

connection [illegible]

this statement:

"Manifestly, [illegible]
reference [illegible]
or that it [illegible]
to the court. [illegible]
the clerk not [illegible]
calendar [illegible]
The provision [illegible]
'all causes shall [illegible]
order they [illegible]
and sufficient [illegible]
the situation [illegible]
by the order of [illegible]
inadvertently [illegible]
the case in [illegible]
and not void.'

This [illegible] in

the case of [illegible]

that seems to [illegible]

court entirely [illegible]

the remedy [illegible]

error from [illegible]

of review. [illegible]

[illegible]

to demur or [illegible]

order, but [illegible]

that the [illegible]

exceptions.

[illegible]

in the [illegible]

of the [illegible]

judgment [illegible]

From the record it appears that A. J. Strandquist, assignee of the mechanic's lien claim of the Rockford Steel Furniture Company, made a motion to be substituted as a party plaintiff in the proceedings, and the fact that he is such assignee does not seem to be controverted. We believe the court was in error in refusing to allow him to be substituted as a party in this action.

One of the cases before us in this branch was that of W. G. Wolff Co. v. Gwynne, 384 Ill. App. Opinion No. 37816. We there held, and the opinion so states:

> "Section 8, Chapter 82, Par. 8 provides: 'That all liens or claims for lien which may arise or accrue under the terms of this act shall be assignable and proceedings to enforce such liens or claims for lien may be maintained by and in the name of the assignee, who shall have as full and complete power to enforce the same as if such proceedings were taken under the provisions of this Act, by and in the name of the claimant.' We are of the opinion, that the assignee has the right to be substituted at any state of the proceedings and shall proceed with all the rights and privileges of the original plaintiff. (Citing Huebner v. Kornaizer, 259 Ill. App. 540, and Boyer v. Keller, 258 Ill. 106.)"

As we have stated, the bill of complaint, with the averments of the claim for lien, stated a cause of action; therefore the decree and the supplemental decree of the lower court is reversed and the cause remanded in order that A. J. Strandquist may be substituted as a party plaintiff, and the court enter such further and other decree as may be consistent with the reasons herein set forth.

REVERSED AND REMANDED.

HALL, P.J. AND DENIS E. SULLIVAN, J. CONCUR.

[illegible]

of the mechanic [illegible]

made a motion [illegible]

ings, and the [illegible]

controverted. [illegible]

allow him to [illegible]

One of the [illegible]

R. S. Kelly [illegible] v. Lyons, [illegible]

held, and the [illegible]

"Section [illegible]

liens or claims for [illegible]

terms of this act [illegible]

such liens or claims [illegible]

name of the [illegible]

to enforce the [illegible]

provisions of this [illegible]

are of the [illegible]

substituted [illegible]

with all the [illegible]

(Citing Hackney v. [illegible]

Kelly, [illegible]

[illegible]

avenues of [illegible]

the decree [illegible]

and the [illegible]

substituted [illegible]

and other [illegible]

forth.

[illegible]

HAIL, J.:

40075

DEPARTMENT OF FINANCE OF THE STATE OF ILLINOIS for the use of THE PEOPLE OF THE STATE OF ILLINOIS,

(Plaintiff) Appellee,

v.

FRANK WAIKASAS,

(Defendant) Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

297 I.A. 635

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This appeal is by the defendant from a judgment for $471.32 entered by the court in plaintiff's action to recover this amount due as a tax and penalties earned and accrued to the 30th day of September, 1936. The action is to recover under the Retailers' Occupational Tax Act of Illinois, being an act, in relation to a tax upon persons engaged in the business of selling tangible personal property to purchasers, for use and consumption, against the defendant as a retailer of tangible personal property measured by the receipts of retail sales of tangible personal property and unpaid to the plaintiff by the defendant.

It appears from the statement filed by the plaintiff:

> "That said defendant filed certain returns as required by said Retailers' Occupation Tax Act; that after the filing of said returns under the provisions of said above named Act, the Department of Finance of the State of Illinois, to ascertain the correctness of said returns, gave to said defendant due notice of a hearing under said act."

And further it appears from the statement:

> "that after said tax was so found to be due upon such hearing, the defendant was duly notified by mail on the 30th day of December, A. D. 1936, of the amount so found due to the complainant under said act, photostatic copy of which notice is hereto attached and marked 'Plaintiff's Exhibit A' and made a part hereof

And it is further alleged:

> "that more than twenty (20) days have elapsed after notice to said defendant of the decision of the said Department of Finance fixing the amount of said tax and penalties and no

suit has been instituted by the defendant to have said finding reviewed by the Circuit Court or Superior Court of Cook County, Illinois, by writ of certiorari from either of said courts."

The defendant filed an affidavit of defense, which was stricken on motion of the plaintiff, and a second affidavit of defense was likewise stricken on motion, and judgment entered in favor of the plaintiff, as we have above stated.

From an examination of the filed affidavit of defense, the defendant made no denial of the material allegations set forth in plaintiff's complaint, except the suggestion made by the defendant that (1) no hearing had been held to determine the defendant's liability under the act, and (2) that he sets up extraneous matter relative to an injunction suit then pending in the Circuit Court of Cook County, Hardon, et al. v. Nudelman, Case No. 37c9205 wherein it was claimed that the Retailers' Occupation Tax act had been superseded by the "Drem Shop Act".

The first contention of the plaintiff we will consider is, that where the statute provides a remedy for an unjust tax finding, the taxpayer must first avail himself of this remedy. Failing to do so, he is subsequently barred from raising a defense going to the merits when an action is brought to reduce the tax finding to judgment. In considering the question involved, it is well to have the material provisions of the Retailer's Occupation Tax Act of 1935, Ch. 120, entitled "Revenue" (Illinois St. Bar Stats.) before us. Par. 429, Sec. 4 of the act provides that:

"If the department has reason to believe and does believe, that any return is incorrect, after notice to the person making the return and a hearing, it shall correct such return according to its best judgment and information, which returns so corrected by the department shall be prima facie correct. * * *"

It is provided by Par. 430, section 5 of the act that:

"In case any person engaged in the business of selling tangible personal property at retail fails to make a return

[illegible]

[illegible]

attorney [illegible]

defense [illegible]

favor [illegible]

[illegible]

the defendant [illegible]

in plaintiff's [illegible]

defendant [illegible]

defendant's [illegible]

existence [illegible] in

the circuit [illegible]

No. 37649. [illegible]

fax not [illegible]

The first [illegible]

that when [illegible]

the taxpayer must [illegible]

do so, he is [illegible]

merits when [illegible]

mend. In [illegible] it is still to have the

material [illegible]

Ch. 120, [illegible]

Par. 42, [illegible]

"It [illegible] shall [illegible] the [illegible] to the [illegible] by [illegible]"

It is [illegible]

In [illegible] [illegible]

when and as herein required, the department, after notice to such person and a hearing thereon, shall determine the amount of such tax according to its best judgment and information, which amount so fixed by the department shall be prima facie correct. * * *"

Par. 433, Section 8 of this act provides the method that shall be pursued in passing upon questions involved regarding the correctness of any return as follows:

"For the purpose of ascertaining the correctness of any return, or for the purpose of determining the amount of tax due from any person engaged in the business of selling tangible personal property at retail, the department or any officer or employee of the department designated, in writing, by the director thereof, may hold investigations and hearings concerning any matters covered by this Act and may examine any books, papers, records or memoranda bearing upon the sales of tangible personal property of any such person and may require the attendance of such person or any officer or employee of such person, or of any person having knowledge of such sales, and may take testimony and require proof for its information. In the conduct of any investigation or hearing, neither the department nor any officer or employee thereof shall be bound by the technical rules of evidence and no informality in any proceeding, or in the manner of taking testimony, shall invalidate any order, decision, rule or regulation made or approved or confirmed by the department. The department or any officer or employee thereof shall have power to administer oathe to such persons."

And then the act provides in Par. 437, section 13 for authority to make and promulgate rules and regulations for the purpose of ascertaining the amount that may be due, as follows:

"The department is authorized to make, promulgate and enforce such reasonable rules and regulations relating to the administration and enforcement of the provisions of this act as may be deemed expedient.

Whenever notice of hearing is required by this Act, such notice may be given by United States registered mail, addressed to the person concerned at his last known address, not less than seven (7) days prior to the day fixed for the hearing.

All hearings provided for in this Act shall be held in the county wherein the taxpayer resides or has his principal place of business.

The Circuit and Superior Court of the county wherein the taxpayer resides or has his principal place of business shall have power to review all questions of law and fact determined by the department in administering the provisions of this Act by writ of certiorari to the department. If the taxpayer is not a resident of this State or has no principal place of business in this State, such venue shall be in Sangamon County.

Such writ shall be issued by the clerk of the court upon praecipe and it shall be served at least ten (10) days before the return day thereof. Service upon the director, assistant director or administrative auditor of the Department of Finance

[illegible]

Par. 452. [illegible]

pursued in [illegible]

of any return [illegible]

[illegible]

any return, [illegible]
due from [illegible]
personal [illegible]
employee [illegible]
director [illegible]
ing any [illegible]
papers, [illegible]
personal [illegible]
attendance [illegible]
person, or [illegible]
any tax [illegible]
the course of [illegible]
not any [illegible]
technical [illegible]
or in the [illegible]
deputation, [illegible]
the department. [illegible]
shall have [illegible]

And then [illegible]

make and [illegible]

assert-ing [illegible]

"The [illegible]
enforce such [illegible]
administration [illegible]
as may be deemed [illegible]
[illegible]
such notice [illegible]
addressed [illegible]
not less than [illegible]
[illegible]
county where [illegible]
of business.
The [illegible]
taxpayer [illegible]
have, [illegible]
by the [illegible]
by virtue of [illegible]
a [illegible]
in this [illegible]
[illegible]
process [illegible]
the [illegible]
[illegible]

shall be service upon the department. Such suits shall be commenced within twenty (20) days after a taxpayer has notice of the department's decision in any such matter. The department shall certify the record of its proceedings if the taxpayer shall pay to it the sum of five cents (5¢) per one hundred (100) words of such record."

The cited provisions of this act are controlling upon the questions we are here considering.

The first question of importance to be considered at this time is, whether the defendant complied with the provisions of the act in order to have all questions of law and fact determined by the Department of Finance in the administration of this Act now under consideration.

The act itself provides that in order to have these questions further determined it is necessary that the defendant have issued by the Clerk of the Circuit or Superior Court, upon praecipe, a writ of certiorari directed to the department in question, and upon this writ the Circuit or Superior Court, as the case may be, determines the questions of fact, as well as of law. This, however, was not done in the instant case. After the 20 day period had elapsed the plaintiff instituted a suit for the purpose of obtaining a judgment against the defendant, which it did, and then in that action the defendant raised the question that no evidence was heard by the plaintiff in its administrative capacity to fix the amount claimed to be due from the defendant. And further, it is claimed that the defendant was denied the right to present such evidence upon this question. It does appear that the defendant had an opportunity to appear before the Department of Finance and present such facts as he deemed important upon the hearing of the matter in question, and thereafter if there was any question he believed should be determined, he still had the right to have this hearing before the department reviewed by a court of competent jurisdiction.

A pertinent opinion of the Supreme Court in the case of Winter v. Barrett, 353 Ill. 441, has been called to our attention,

shall be payable [illegible] commenced within ten days [illegible] notice of the Department's [illegible] shall certify the [illegible] shall pay to it [illegible] (100) weeks of such [illegible] [illegible] hundred

The [illegible] controlling [illegible] questions [illegible]

The first [illegible] time is, whether [illegible] not in order to [illegible] the Department [illegible] under consideration.

The [illegible] questions further [illegible] issued by the [illegible] a writ of certiorari [illegible] upon this writ [illegible] determine the [illegible] was not done in [illegible] elapsed the [illegible] a judgment [illegible] action the defendant [illegible] by the plaintiff [illegible] claimed to be [illegible] that the [illegible] upon the [illegible] opportunity [illegible] such fact [illegible] in question, [illegible] should be taken [illegible] before the [illegible] [illegible] in the case of Winter v. [illegible] [illegible] obtained,

in which opinion the court, in part, said:

> "In enacting laws the legislature cannot deal with the details of every particular case, and reasonable discretion as to the manner of executing a law must necessarily be given to administrative officers. Such officers, in the performance of their duties, are frequently called upon to exercise judgment and discretion, to investigate and decide, and yet in doing so they do not exercise judicial power within the meaning of the constitution. (Italia America Shipping Corp. v. Nelson, supra; Grand Trunk Western Railway Co. v. Industrial Com. 291 Ill. 167; Mitchell v. Lowden, 288 id. 327; Klafter v. Examiners of Architects, 259 id. 15; People v. Apfelbaum, 251 id. 18; State v. Illinois Central Railroad Co. 246 id. 188). * * * The powers conferred upon the Department of Finance to administer this act are not arbitrary, and, so far as the general power conferred upon the department is concerned, the case is not in anywise different in principle from the cases above cited."

As we have stated, we believe any and all questions of law raised by the defendant should have been presented at the hearing held by the Department of Finance, and reviewed by a writ of certiorari issued by the clerk of the Circuit or Superior Court of Cook County, as provided for by this statute.

Plaintiff calls our attention to the point urged by the defendant that the "Dram Shop Act" has superseded the Retailers' Occupation Tax Act, and therefore defendant, as a tavern keeper, is not required to pay any occupation tax, and that this question was raised directly in the above cited case of Bardon, et al. v. Nudelman, which originated in the Circuit Court of Cook County, and further suggested that the defendant contends that the decision in the Bardon, et al. v. Nudelman case is adverse to the contention of the plaintiffs therein, in that the plaintiffs perfected their appeal to the Supreme Court of Illinois. As we have indicated in this opinion, the questions raised by the defendant are controlled by the provisions of the act in question, for the reason that the questions of law and fact are to be determined by a writ of certiorari proceeding, and the allegation of the defendant that he received no hearing before the Department of Finance, cannot be properly raised on this appeal, for the matter should have been raised on a writ of certiorari, as provided for in the Act.

in which [illegible]

"[illegible]
results [illegible]
to the [illegible]
admiral [illegible]
their [illegible]
and [illegible]
they do [illegible]
consult [illegible]
Grand Rush [illegible]
187; McKinney [illegible]
Axonitovic, [illegible]
v. Illinois [illegible]
considered [illegible]
are not [illegible]
upon the [illegible]
different [illegible]

[illegible]

raised by [illegible]
held by the [illegible]
certiorari [illegible]
Cook County, [illegible]

[illegible]

defendant [illegible]
Cooperation [illegible]
not recline [illegible]
a last direct [illegible] v. [illegible],
which ori [illegible]
suggested [illegible]
et al. v. [illegible]
therein, in [illegible]
Court of [illegible]
raised by the [illegible]
question, [illegible]
be determined [illegible]
of the [illegible]
of liner [illegible]
should [illegible] certiorari [illegible] for in
the lot.

In the case of The People v. Elmwood Cemetery Co., 317 Ill. 547, in an opinion of the Supreme Court, which is material to the questions involved in this appeal, the court said:

> "This is not an appeal to review the action of the body fixing the tax, but is an action in debt for the collection of a delinquent tax fixed by the taxing authorities and extended by the county clerk in the manner provided by law. The trial court found the capital stock had some value and should pay some tax and substituted its judgment as to that tax and necessarily found a different valuation. This the court was without authority to do. In an action in debt to collect delinquent taxes, irregularities in the assessment of taxes or overvaluation by the taxing authorities, not amounting to fraud, cannot be inquired into. Where the statute provides a remedy against excessive assessment or valuation of property the taxpayer must avail himself of this remedy and cannot resort to the courts in the first instance in defense of an action for collection of a delinquent tax. Cumming v. Webber, 218 Ill. 521; Hulbert v. People, 189 id. 114; Keokuk and Hamilton Bridge Co. v. People, supra; Camp v. Simpson, 118 Ill. 324; Adsit v. Lieb, 76 id. 198."

In the late case of People v. Oakridge Cemetery Corporation, 328 Ill. 53, this same question was before the Supreme Court for consideration. The court there said:

> "It was established, however, in Oak Ridge Cemetery Corp. v. Tax Commission, supra, as the law, that the tax-payer must, if he would avoid over-valuation of an assessment of his property, avail himself of the remedy provided by law, and unless he does so he cannot successfully resist the payment of the tax in court. The evidence offered in this case would have been properly admissible before and properly considered by the taxing body having to do with the fixing of the assessed valuation, which in this case was the tax commission, and a review could have been had in the Circuit Court on consideration of such evidence offered before the commission.
>
> This is an action in debt for the collection of a tax and is a collateral action. The appellant seeks the benefit of evidence in defense of that action which it had no right, under the established rules of law, to offer in defense of the assessment in a direct proceeding in court on appeal from the decision of the tax commission. It is a fundamental rule of law that one may not be permitted to do indirectly that which he cannot do directly. Appellant having failed to avail itself of the remedy provided by law for over-valuation of its capital stock, cannot urge such defense in an action for the collection of the amount of the tax. People v. Hibernian Banking Ass'n., 245 Ill. 522."

We believe what was said by the Supreme Court in the opinion just quoted has a material bearing upon the case here on appeal. The act provides for the further consideration of the

[illegible]

III, 267, in [illegible]

the question [illegible]

"This is not [illegible]
the tax, but [illegible]
delinquent tax [illegible]
by the county [illegible]
court [illegible]
some tax [illegible]
necessarily [illegible]
without authority [illegible]
delinquent [illegible]
overvaluation [illegible]
cannot be [illegible]
against [illegible]
payment [illegible]
the county [illegible]
collection [illegible]
Sol; Indemnity [illegible]
Co. v. [illegible]
Ohio, 70 [illegible]

In the [illegible]

328 III. 26, [illegible]

consideration. [illegible]

"It was [illegible]
Tax Commission, [illegible]
he would [illegible]
avail himself [illegible]
so be [illegible]
The evidence [illegible]
able before [illegible]
do with [illegible]
was the tax [illegible]
Circuit Court [illegible]
the contract.
"This is [illegible]
and is a [illegible]
evidence in [illegible]
the [illegible]
assessment [illegible]
isolation [illegible]
law [illegible]
be [illegible]
of the [illegible]
stock, [illegible]
of the [illegible]
328 III. [illegible]

We believe that [illegible]

opinion [illegible]

"[illegible]

action of the Department of Finance in reaching its conclusion in fixing the amount due from the defendant, and, as we have stated, the defendant should have complied with the act in suing out a writ of certiorari to the Superior or Circuit Court for further consideration of the facts sought to be considered in the case here on appeal, and applying by analogy the reasoning of the Supreme Court in the case just cited, we can do nothing but sustain the action of the trial court in entering the amount of the judgment.

Another point urged by the defendant is that the trial court should have delayed passing upon this question, for the reason that an injunction was issued in the case of Gardon et al. v. Nudelman, which is now pending in the Circuit Court of Cook County, and which will have a material bearing upon the question involved. We believe the trial court acted properly in proceeding with the trial. The issue in the instant case is not the same as the issue in the Nudelman case. In the latter, there was an injunction to restrain the disposition of a fund received in a matter of somewhat similar import, whereas in this case the plaintiff seeks to recover the amount due from the defendant.

The defendant contends that the "Dram Shop Act" was passed and became effective one year after the Retailers' Occupational Tax Act was passed, and that the defendant licensed as a tavern keeper is not required to pay an occupation tax as provided by that statute. The Dram Shop Act was passed in 1934 by the legislature of this state, Ch. 43, Ill. State Bar Stats. 1935. From an examination of the act, it is clear that it was passed to control the manufacture and sale of alcoholic liquors, and not as a tax, but a license or privilege to do business of the kind the applicant desires to carry on under the "Dram Shop Act". The license is but a personal privilege. The legislature has stated in Article VI of Par. 26, Sec. 1, that

[illegible] ing its conclusion in
fixing the amount due from the [illegible], we have stated,
the defendant should have [illegible] it is going out
writ of certiorari to the [illegible] court for further con-
sideration of the claim raised by the defendant in the case now on
appeal, and analyzing by analogy the reasoning of the Supreme Court
in the case just cited, we can by motion, but within the action of
the trial court in entering the [illegible] judgment.

Another point [illegible] the defendant in the trial
court should have raised [illegible] question, for the [illegible]
that an injunction was issued in [illegible] v. [illegible]
which is now pending in the [illegible] of Cook County, and which
will have a material [illegible] involved. We believe
the trial court [illegible] the trial. The
issue in the instant [illegible] on the issue in the
Budelman case. In [illegible] injunction [illegible]
the disposition of [illegible] of assessment as like
import, whereas in [illegible] seeks to recover the
amount due from the [illegible].

The legislature [illegible] the "Item No. [illegible]" was passed
and became effective [illegible] Utilities' Occupational
Tax Act [illegible] licensed or [illegible]
keeper is not [illegible] tax as provided by the
statute. The [illegible] in 1934 by the legislature
of this state, [illegible] 1935. [illegible] examina-
tion of the act, [illegible] to collect the
manufacture [illegible] license, not as a tax, but a
license [illegible] to carry on [illegible]". The license is but a personal
privilege. [illegible] stated in Article VI of tax, Sec. 1, [illegible]

> "A license shall be purely a personal privilege, good for not to exceed one year after issuance unless sooner revoked as in this Act provided, and shall not constitute property, nor shall it be subject to attachment, garnishment or execution, nor shall it be alienable or transferable, voluntarily or involuntarily, or subject to being encumbered or hypothecated. * * * "

So from this language alone it is apparent that it is a privilege granted to the applicant to do business in this state, and is not a tax levy upon the doing of business, and does not by its terms repeal the Retailers' Occupation Tax Act. This conclusion is supported in a measure by the title of the Retailers' Occupation Tax Act, wherein it is stated, Ch. 120, Par. 439, Sec. 14, (Ill. Rev. Stats. 1935)

> "This Act shall be known as the 'Retailers' Occupation Tax Act' and the tax herein imposed shall be in addition to all other occupation or privilege taxes imposed by the State of Illinois or by any municipal corporation or political subdivision thereof."

We are of the opinion that the privilege to transact the business of a dram shop is not a tax in the sense that it superseded the Retailers' Occupation Tax Act, as we have indicated. The judgment is affirmed.

JUDGMENT AFFIRMED.

HALL, P.J. AND DENIS E. SULLIVAN, J. CONCUR.

40086

SIGMUND KLIMCZAK, Adm'r. of the estate of Robert Klimczak,

(Plaintiff) Appellant,

v.

DRULEY-O'BRIEN COMPANY and JOHN LEUDERS,

(Defendants) Appellees.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

297 I.A. 635

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

The plaintiff instituted suit in the Superior Court of Cook County to recover damages for the death of his two and a half year old son, Robert Klimczak, alleged to have been caused by the negligence of the defendant John Leuders in the operation of an automobile truck owned by Druley-O'Brien Company, also a defendant.

There was a verdict of not guilty and a judgment thereon from which the plaintiff appeals.

On March 28, 1935, the plaintiff and his family lived in an apartment on the north side of North Avenue near Holt Street, in Chicago, Klimczak and his son Robert, who was two years and seven months of age at the time of the accident, were playing at the foot of the stairway leading to their apartment. The plaintiff's wife called him to dinner, and he left his son playing at the foot of the stairs leading to their apartment where, as he stated, the gate to an enclosure which prevented the child from leaving the hallway was closed. It appears that on the same date a truck of the defendant Druley-O'Brien Company was being driven east on North Avenue by John Leuders, also a defendant. This truck was loaded with four tons of coal.

It appears from the evidence of witnesses, who were called to testify, that the plaintiff's intestate ran out from between

parked cars and the child was knocked down by a truck owned by the defendant company; that the driver of the truck applied the brakes, and that he stopped about 15 feet from the child after it was struck. The distance from where the child was struck and the place where the automobile truck was stopped is a disputed question of fact.

Witnesses who were present at the scene when the accident happened testified the truck and the boy approached the scene of the occurrence at the same time, and that the child ran out from between two parked cars; that the truck struck him and then was stopped.

The driver of the truck of the defendant company, testified the truck was going about 12 miles an hour, and that the body of the child was not very far from the truck when it stopped. As we have stated, there is a dispute as to the exact place where this boy was lying in the street car track after he was struck by the automobile truck.

Three witnesses were produced by the plaintiff - the motorman Grady, Peterson and Miss Perkas. From the evidence it appears that Miss Perkas did not know the accident had happened until the motorman of the eastbound North Avenue street car on which she was riding called it to her attention. She corroborated the testimony offered by the defendant that there was a truck parked on the south side of North Avenue.

The witness Peterson, also a passenger on this same car, testified he was reading a newspaper when the motorman slacked his speed,looked back,and said:"Look at this;" that the passengers on the car rushed out upon the platform to see what it was. It does not appear that Peterson was an eye-witness to the occurrence,but that he arrived at the scene about two or three minutes afterwards. He also said in his testimony that there was a stake truck and four or five

[illegible]
by [illegible]
apple [illegible]
child [illegible]
street [illegible]
dispute [illegible]
[illegible]
that [illegible]
of the [illegible]
between [illegible]
stop [illegible].

[illegible]
[illegible]
filed the [illegible]
of the car [illegible]
we have [illegible]
boy ran [illegible]
automobile [illegible].

[illegible]
motorman [illegible]
approach [illegible]
the motorman [illegible]
was [illegible]
many of [illegible]
south [illegible].

[illegible]
testimony [illegible]
speed, [illegible]
[illegible]
[illegible]
[illegible]
[illegible]

other vehicles parked alongside the south curb of North Avenue. The motorman Grady testified that as he operated the street car east on North Avenue he was about 35 feet behind the truck and saw the accident happen; that he could see underneath the truck up to the front wheels, and he testified there were no cars parked along the south curb of North Avenue, the side of the street from which this child darted out into the street car tracks.

Just how the child passed through the gate after it was closed is not in the record, but the fact is that he reached the sidewalk and then passed out into the street and was struck by this loaded coal truck.

The plaintiff contends that the defendants failed to keep a proper lookout, and points to the evidence of the alleged distance the truck traveled after it struck the child and came to a stop. In the record there is testimony of witnesses that the truck driver made a quick stop, and that the body of the boy after he was struck was not more than 15 feet from the rear of the truck. This, of course, was another question of fact for the jury.

It is further contended that the defendant driver was charged with negligence in turning his truck into the direction from which the child was coming. The answer of the defendant to the proposition is that it was the proper thing to do, because there was the possibility that the child might keep on running and clear the truck. Questions of this kind are for the jury and, as we have indicated, they no doubt considered the credibility of the witnesses, and the testimony governing these questions.

The defendants cite an early case entitled Chicago City Railway Co. v. Young, 62 Ill. 238, in which the Supreme Court said:

"The weight, to be given to one more than another, has been, and properly should be, determined by the jury.

The attempt of this court to reconcile conflicting evidence, to determine its preponderance when fairly balanced, and to decide

other vehicles [illegible] long [illegible] [illegible] whose motorman merely testified that he [illegible] North Avenue [illegible] happen; that he could see [illegible] and he testified there were no [illegible] North Avenue, [illegible] into the [illegible].

Just on the other side [illegible] is not in the record, but [illegible] and then [illegible] truck.

The [illegible] a proper lookout, [illegible] the truck travel[illegible] the record there [illegible] a quick stop, [illegible] not more than [illegible] another [illegible] jury.

It is [illegible] with negligence [illegible] child was [illegible] that it [illegible] that the child [illegible] of this kind [illegible] considered the credibility of the witnesses, and the [illegible] ing these questions.

In defendants' [illegible] Co. v. Lynn, 87 Ill. 348, in which the [illegible]:

"The weight to be given to one more than another, [illegible] properly [illegible] determined by the jury.

The [illegible] of this court [illegible] to determine the preponderance when [illegible] [illegible]

as to the credibility of witnesses, would be a usurpation of the functions of the jury."

Upon this question our attention has been called to a late case entitled The People v. Moore, 362 Ill. 102, where the Supreme Court said:

> "The jury was afforded the opportunity of observing the conduct and demeanor of the witnesses both for the People and for the defendant while testifying and was in a better position to weigh their testimony than is a reviewing court. The law has committed to the jury the determination of the credibility of the witnesses and of the weight to be accorded to their testimony, and where the evidence is merely conflicting this court will not substitute its judgment for that of the jury."

The deceased was a healthy normal child and left him surviving his parents and two younger sisters, and the evidence discloses that the parents ten minutes before the accident occurred had left him to play at the foot of the steps leading to their apartment, locked in an enclosure by a gate constructed and installed by the parents for his protection.

Of course this infant, due to his tender age, could not be guilty of contributory negligence, and in order for the next of kin to recover damages it must appear that the parents used due care in safeguarding the child, considering the circumstances at the time of the occurrence.

The plaintiff contends that the driver of the truck, John Leuders, was negligent in at least one of the following particulars:

(a) Failure to sound his horn;
(b) Failing to keep a proper lookout, as evidenced by the distance traveled before coming to an initial stop;
(c) By turning into the direction from which the child was coming; and
(d) By knocking down the child away out from the curb in the middle of the car track.

and that where the questions of fact are close and controverted it necessarily follows that the instructions given should be clear and not contradictory.

The first instruction of the defendants called to our attention as being subject to criticism is as follows:

as to the credibility [illegible]
the functions of the jury.

Upon this [illegible]

case entitled [illegible] v. [illegible], [illegible]

Court said:

> "The jury [illegible]
> conduct and [illegible] not of the [illegible]
> for the [illegible]
> to weigh their [illegible]
> committed to the jury the [illegible] credibility of the
> witnesses and of the [illegible]
> and where the evidence is [illegible]
> substitute its judgment [illegible]

The [illegible]

surviving his wife [illegible]

disclosed that the [illegible]

had left him [illegible]

ment, looked in an [illegible]

the secrets [illegible]

Of course this [illegible]

guilty or could [illegible]

to recover [illegible]

safeguarding the [illegible]

the occurrence.

The [illegible]

leudere, we begin [illegible]

(a) [illegible]
(b) [illegible]
the distance travelled [illegible]
(c) [illegible]
was going; and
(d) [illegible]
in the middle of the [illegible]

and that where the [illegible]

necessarily [illegible]

not [illegible]

The [illegible]

attention [illegible]

> "Even if you should find that the driver of the defendant's truck was guilty of negligence, nevertheless you may not find the defendants guilty unless a preponderance of the evidence shows that the negligence of the defendant's driver, if there was any negligence, was a proximate cause of the accident, *** "

Up to this point the instruction is clear and not subject to the criticism that it is a contradictory statement of law, but when we come to consider what follows, which is:

> "and if you believe from the evidence that the accident was proximately caused by the plaintiff's intestate running into the street in front of the defendant's truck and was not proximately caused by any negligence on the part of the defendant's driver, you must find the defendants not guilty,"

we find it is conceded that if it appears from a preponderance of the evidence that there was negligence in the operation of the truck by the defendant company's driver and such negligence was a proximate cause of the accident, then the jury would be justified in finding the defendants guilty. Then what follows is by its terms contradictory. The instruction given and read to the jury advises the jurors that if the accident was proximately caused by the plaintiff's intestate running into the street in front of the truck and was not proximately caused by the negligence of the driver, you must find the defendants not guilty. This is clearly contradictory to the statement read to the jury in the first paragraph of the instruction, where it is indicated that the jury would find the defendants guilty if from a preponderance of the evidence it is shown that the driver's negligence was the cause of the accident.

It is further contended by the plaintiff that this instruction was erroneous and damaging to plaintiff's case, because it alludes to the plaintiff's intestate's action in running into the street in front of defendant's truck, when as a matter of fact this was a controverted question, and the plaintiff's intestate being an infant of tender years his actions would not amount to contributory negligence and act as a bar to recovery.

The defendants' answer to this contention of the plaintiff

"Even if you should find [illegible]
truck [illegible]
the [illegible]
shows [illegible]
was my right [illegible]

Up to this [illegible]

criticism [illegible]

come to consider [illegible] follows, [illegible]:

"And if you believe from the [illegible]
proximately [illegible]
the street in front of the [illegible]
proximately [illegible]
driver, you [illegible]

we find it is a proved that if it [illegible]

the evidence that there [illegible]
by the defendant [illegible]
cause of the [illegible]
the defendants [illegible]
The instructi[illegible]
the accident [illegible]
ning into the street [illegible]
caused by the [illegible]
not guilty. This is [illegible] to the
jury in the [illegible]
that the jury [illegible]
of the evidence [illegible]
cause of [illegible].

It is [illegible]
tion [illegible]
alluded to [illegible]
street in front [illegible]
was a contract [illegible]
intent of [illegible]
negligence [illegible].

[illegible] the [illegible]

is that this instruction is apparently based upon a mistaken impression that it is a contributory negligence instruction. Actually, the instruction has nothing whatever to do with contributory negligence and merely covers the question of proximate causation between the defendants' alleged negligence and the accident. If this statement of the defendants is true, and it merely covers the question of proximate causation between the defendants' alleged negligence and the accident, then this statement is contradictory to the paragraph of the instruction offered by defendants that if the driver of the defendant's truck was guilty of negligence the jury could not find defendants guilty, unless by a preponderance of the evidence.

If the defendants endeavored to show by this instruction that the child was in the street by reason of negligence of his parents, that should have been incorporated in the instruction so as not to confuse the jury by the statement that if the accident was proximately caused by plaintiff's intestate running in front of defendant's truck, and not by any negligence on the part of the defendant's driver, the defendants are not guilty.

The question here involved is whether, from a preponderance of the evidence, the defendant's driver in the operation of the truck was guilty of negligence, and this negligence was a proximate cause of the accident. The case should have been submitted upon this theory, and if the parents' negligence in the care of the child contributed to the accident, the jury should have been advised of this provision of law, and not by a statement which would tend to confuse the issue.

Plaintiff complains of other instructions, but it will not be necessary to consider them as this case will have to be retried for error in the giving of the instruction we have considered, and for such error the judgment for the defendants is reversed and the cause remanded for another trial.

REVERSED AND REMANDED.

HALL, P.J. AND DENIS E. SULLIVAN, J. CONCUR.

39685

In the Matter of the Estate of LORETTA STUART, a minor,

LORETTA STUART and LORETTA STUART, as Guardian of the Estate of EDWARD STUART, Minor, ANASTASIA MICHALEK, as Guardian of the Estate of WALTER AND THERESA ZIOLKOWSKI, Minors,

Appellees,

v.

WALTER A. WADE, as Administrator de bonis non of the Estate of WALTER ZIOLKOWSKI, Deceased,

Appellant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

297 I.A. 635

MR. JUSTICE DENIS E. SULLIVAN DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order entered in the Circuit Court upon the amended petition of Loretta Stuart, that the Administrator of the Estate of Walter Ziolkowski, Deceased, be ordered to turn over to the petitioner a certain share of insurance money collected by the administrator upon two policies on the life of said Walter Ziolkowski, payable to his wife Monika Ziolkowski, as beneficiary, whose death occurred prior to that of her husband Walter Ziolkowski, and also upon two policies upon the life of the said Monika Ziolkowski, payable to her husband as beneficiary. An answer was filed by Anastasia Michalek, individually and as guardian of the Ziolkowski children, denying that the petitioner was entitled to the relief prayed.

The Probate Court found that Walter Ziolkowski wilfully and wantonly killed his wife, Monika, and ordered Walter Ziolkowski's Administrator to pay over to Monika Ziolkowski's Administratrix all the money collected on all the policies.

An appeal was perfected from this order to the Circuit Court where Loretta Stuart, the guardian and administratrix, was permitted to testify over objection, that her mother had been murdered by her step-father, but the Circuit Court decided that the

money should be paid to the children of Monika Ziolkowski instead of to the administratrix.

The theory of plaintiff's xxxxxx is that the testimony of Loretta Stuart in the Circuit Court was improperly admitted, the witness being an interested party contrary to the provisions contained in Chapter 51, Section 2 of the Evidence Act, Ill. Rev. Stats. 1937; that even admitting that Walter Ziolkowski did wrongfully kill his wife, this would not bar his children from recovering the benefits under the insurance policies on his life; that the action of Loretta Stuart was improperly brought against the appellant herein instead of the insurers.

Appellees' theory of the case is that appellee not being a claimant in the technical sense of the word, as used in Probate Procedure, is not an "interested party"" within the meaning of Chapter 51, Section 2 of the Evidence Act; that the killing of Monika Ziolkowski by Walter Ziolkowski deprived him of all his rights in the insurance policies on her life payable to himself as beneficiary and in those policies on his own life, payable to her as beneficiary; that appellant having recovered money from the insurers on policies in which appellee claims an interest, the claim is properly brought against appellant directly in the Probate Court.

Prior to joining issue in this court Loretta Stuart, individually, Loretta Stuart as Guardian of the Estate of Edward Stuart, minor, and Seymour M. Lewis, as administrator de bonis non of the estate of Monika Ziolkowski, deceased, by Seymour M. Lewis and Leon M. Despres, severally and jointly moved the court to dismiss the appeal filed herein, for the reason that notice of appeal had not been properly served in conformity with the rules of practice.

The provisions of the Civil Practice Act and the rules of the Supreme Court relating to the giving of notices of appeals, is in part as follows:

money [illegible]
of to [illegible].

xxxxxx

Loretta [illegible]
witness [illegible]
in Chapter [illegible]
that even [illegible]
wife, [illegible]
under the [illegible]
street [illegible]
of the insurer.

Plaintiff in [illegible]
Procedure, [illegible]
Chapter [illegible]
Monks [illegible]
in the [illegible]
and in [illegible]
that [illegible]
in which [illegible]
against [illegible]

Initial [illegible]
street, [illegible]
the entire [illegible]
Leon [illegible]
[illegible]
not [illegible]

[illegible]

[illegible]

"Service of Notice of Appeal.
Rule 34. (1) A copy of the notice by which the appeal is perfected shall be served upon each appellee and upon any co-party who does not appear as appellant, and upon any other person or officer entitled by law to a notice of appeal, within 5 days after said notice of appeal is filed in the lower court."

The notice of appeal in this case apparently recites that Elizabeth Michalek as administratrix de bonis non of the estate of Walter Ziolkowski, deceased, was appellant and was substituted by Walter A. Wade as de bonis non of said estate. Appellant's notice of the filing of notice of appeal is signed by the attorney for Elizabeth Michalek as administratrix de bonis non of the estate of Walter Ziolkowski, deceased and is addressed to Seymour Lewis, attorney for Loretta Stuart, individually and as guardian of the estate of Edward Stuart, minor, and Anastasia Michalek as guardian of the estate of Walter and Theresa Ziolkowski, minors, and is receipted for by Seymour M. Lewis, attorney for Loretta Stuart, individually, and as guardian of the estate of Edward Stuart, minor and Anastasia Michalek as guardian of the estate of Walter and Theresa Ziolkowski, minors. Lewis was also administrator de bonis non of the estate of Michael Ziolkowski, deceased.

It further appears from the record that in addition to the parties to whom notice was given, there were approximately 10 other parties of record in the Circuit Court upon whom no notice was served. They were, undoubtedly, the "co-parties" intended by this rule of court, and the failure to serve notice on them is in violation of such rule.

It is claimed in the motion that the opposing counsel misled appellant's counsel as to whom he represented and that when notice was served upon him he should have indicated whom he represented. We are not passing upon whether or not the ethics between counsel were proper, but the failure to serve notices of appeal upon all parties to the suit in the Circuit Court was a violation of the Civil Practice Act and the rules pertaining thereto.

For the reasons herein given the appeal is dismissed.

HEBEL, P.J. AND HALL, J. CONCUR. APPEAL DISMISSED.

39685

In the Matter of the Estate of LORETTA STUART, a minor,	)
LORETTA STUART and LORETTA STUART, as Guardian of the Estate of EDWARD STUART, Minor, ANASTASIA MICHALEK, as Guardian of the Estate of WALTER AND THERESA ZIOLKOWSKI, Minors,	) APPEAL FROM) CIRCUIT COURT
Appellees,	) COOK COUNTY.
v.	)
WALTER A. WADE, as Administrator de bonis non of the Estate of Walter Ziolkowski, Deceased,	) 297 I.A. 635 4A
Appellant.	)

ON REHEARING.

MR. JUSTICE DENIS E. SULLIVAN DELIVERED THE OPINION OF THE COURT.

An opinion was filed by this court in the above entitled cause on June 29, 1938, and a rehearing was granted on petition of the attorneys for appellees. In their petition for rehearing counsel contends that all parties in interest had received notice of appeal. The record in this case shows to the contrary.

After reconsidering the entire matter, we have come to the conclusion that the decision reached in our former opinion dated June 29, 1938, was correct and should be adhered to in all particulars.

For the reasons stated the appeal is dismissed.

APPEAL DISMISSED.

HALL, P.J. AND HEBEL, J. CONCUR.

In the matter of the [illegible]
[illegible]

[illegible]
Guardian of the [illegible]
Minor, [illegible]
of the Estate of [illegible]
[illegible], Appellee.

---

v.

[illegible]
[illegible] of the [illegible]
Deceased.

MR. JUSTICE [illegible]

[illegible]

cause on June [illegible], [illegible]
of the [illegible]
counsel [illegible]
of appeal. [illegible]

[illegible]

the conclusion [illegible]
dated June [illegible], [illegible]
particulars.

[illegible]

[illegible]

[illegible]

39923

PEOPLE OF THE STATE OF ILLINOIS, ex rel JOHN S. RUSCH, Appellee,	APPEAL FROM
v.	COUNTY COURT,
WILLIAM GILBERT, FRANK CATO, LORRETTA WIREN and MARY BARRETT, Appellants.	COOK COUNTY.

297 I.A. 636

MR. JUSTICE DENIS E. SULLIVAN DELIVERED THE OPINION OF THE COURT.

The defendants, William Gilbert, Frank Cato, Lorretta Wiren and Mary Barrett bring this appeal from a judgment order entered in the County Court finding each of said defendants guilty of contempt of court and sentencing each of them to one year in the common jail of Cook County, Illinois.

The above named defendants served as judges and clerks of election in November, 1934, and on February 6, 1936, a petition was filed by the relator John S. Rusch, alleging that while serving and acting as judges and clerks, said defendants did fraudulently make a false canvass and return of the votes cast in the 34th precinct of the 42nd Ward and were guilty of corrupt and fraudulent conduct.

After hearing evidence the court found that the above named defendants, and each of them, excepting Mrs. Tobin, was guilty and sentenced them to one year each in the County Jail.

The cause came on for a hearing on April 29, 1936, and after some 29 continuances, part of which were at the request of defendants, was concluded on November 2, 1936.

The record in this case shows the proceeding to be rather unusual. The general election out of which this case grew occurred in November, 1934. No action was taken until 15 months later in 1936, when the chief clerk of the Election Commissioner's Office, John S. Rusch, filed a petition making the charges as aforesaid. After various hearings the judgment orders and sentences as to the defendants were

entered in November, 1936.

We do not think the ballots in this case were properly admissible in evidence over defendants' objection. They are shown to have been in a box tied with a rope upon which both the seals on the box as well as the seals on the rope were destroyed, also the ballots had been transported to different locations for storage and examination, making it possible and highly probable that the ballots had been tampered with, thereby destroying their evidentiary value.

In the recent case of Sargent v. Newell, 368 Ill. 479, which was an election contest case, the Supreme Court at page 481, said:

> "Actual tampering with the ballots need not be shown to destroy their evidentiary value, but it is enough that the opportunity for unlawful interference was afforded. (Bolton v. Whalen, 350 Ill. 50, and cases therein cited.) Applying the rule to this case, we are of the opinion that the evidentiary value of the ballots was destroyed. In Sibley v. Steiger, 347 Ill. 288, and Mullman v. Cooper, 362 id. 469, we held the mere fact that the ballots were kept in an unlocked receptacle for several days, when the seals remained intact, did not impair the evidentiary value of the ballots. Here, however, the uncontradicted evidence is that the seal at the time of this trial was not the seal that was put on the bag on the night of the election. If, then, the seal was removed, there can be no doubt that there was ample opportunity to tamper with the ballots. Under these circumstances the circuit court correctly held the ballots had not been properly preserved, and that the election returns were controlling."

The ballots in the instant case were wrongfully admitted in evidence. The election law in this State further provides that all ballots must be destroyed by the officials in charge thereof, six months after the election unless a contest for some office was pending. No contest was pending at the time of this hearing.

For the reasons herein given the judgment orders of the County Court sentencing each of the defendants to the County Jail is hereby reversed.

JUDGMENT ORDERS REVERSED.

HEBEL, P.J. AND HALL, J. CONCUR.

entered in [illegible]

[illegible]

admirable [illegible]

have [illegible]

box [illegible]

had been [illegible]

tion, [illegible]

been [illegible]

[illegible]

which [illegible]

"Actual [illegible]
their [illegible]
for [illegible]
III. [illegible]
we are of [illegible]
was destroyed. [illegible]
V. Doubtless [illegible]
were kept in [illegible]
seals removed [illegible]
the ballots. [illegible]
the seal in the [illegible]
on the [illegible]
removed, [illegible]
to tamper with [illegible]
court correctly [illegible]
and the [illegible]

The [illegible]

in evidence. [illegible]

all ballots [illegible]

months after the [illegible]

to contest [illegible]

[illegible]

County [illegible]

hereby [illegible]

[illegible]

39922

PEOPLE OF THE STATE OF ILLINOIS, ex rel JOHN S. RUSCH, Appellee,	)	APPEAL FROM COUNTY COURT, COOK COUNTY.
v.	)	
WILLIAM GILBERT, FRANK CATO, LORETTA WIREN and MARY BARRETT, Appellants.	)	

297 I.A. 636 1A

ON REHEARING

MR. JUSTICE DENIS E. SULLIVAN DELIVERED THE OPINION OF THE COURT.

A petition for a rehearing was filed by the relator, which was granted. The petition does not urge that the court reverse its decision but that certain language used be modified. With this we agree as the evidence supports our conclusion and decision.

Pursuant to the suggestion of counsel for the relator, we are deleting three paragraphs which appear on page 2 of our former opinion, beginning with the words, "We do not think the ballots in this case", etc. and ending with the words, "No contest was pending at the time of this hearing." We have substituted therefor the following:

A careful review of the evidence in this case shows that the charges by the state were not proven by such clear and convincing proof as the law requires. The testimony of the various witnesses refuted the charges made by the relator and as was said in People ex rel Rusch v. Kotwas, 275 Ill. App. 406, the state is required to produce "'most convincing evidence of the truth of the charge' before the respondents could be found guilty, the proceeding being quasi criminal. Oehler v. Levy, 168 Ill. App. 41."

For the reasons herein given the judgment orders of the County court are reversed.

JUDGMENT ORDERS REVERSED.

HALL, P.J. AND HEBEL, J. CONCUR.

40000

CARSON PIRIE SCOTT & COMPANY, a corporation, Appellee, v. CHECKER TAXI COMPANY, a corporation, and C. Gerrits, Defendants. On Appeal of CHECKER TAXI COMPANY, a corporation, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

22A

297 I.A. 636

MR. JUSTICE DENIS E. SULLIVAN DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment entered in the Municipal Court in favor of Carson Pirie Scott & Company, plaintiff, and against the defendant Checker Taxi Company, assessing plaintiff's damages at the sum of $438.49. The defendant C. Gerrits was found not guilty and the Checker Taxi Company brings this appeal.

The action arose owing to the fact that one of the windows in plaintiff's store was broken, through the negligence of defendant.

The evidence shows that the defendant through its servant in operating a taxicab ran into another automobile and as a result of such collision a nut and bolt were thrown through a plate glass window in the store of plaintiff, destroying it; that plaintiff had to pay said sum to have such plate glass window replaced.

Various defenses were interposed such as whether or not Carson Pirie Scott & Company owned or possessed the store or the glass in the window of said store and also that the price to replace said window in its former condition was fixed by a "monopolistic combine". The evidence was ample to prove plaintiff's claim.

The defendant was responsible for the destruction of plaintiff's window and should pay for its replacement. We do not think the amount of damages excessive.

For the reasons herein set forth the judgment of the Municipal Court of Chicago is affirmed.

JUDGMENT AFFIRMED.

HALL, P.J. AND HEBEL, J. CONCUR.

40109

PEOPLE OF THE STATE OF ILLINOIS,) ERROR TO
Defendant in Error,) MUNICIPAL COURT
v.)
ROBERT PEELE,) OF CHICAGO.
Plaintiff in Error.)

297 I.A. 636

MR. JUSTICE DENIS E. SULLIVAN DELIVERED THE OPINION OF THE COURT.

This cause comes before us for review on a writ of error to the Municipal Court. The trial court found the defendant Robert Peele guilty of having obtained money by false pretenses and entered judgment on the finding assessing defendant $100.00 and costs.

The information charged the defendant with having knowingly, maliciously, designedly and unlawfully pretended to Loretta Ehrlich that the defendant "did operate the nursing home known as 'Aristocrat' and that the patients to be lodged in said nursing home were attended by female nurses"; that the defendant at the time the said representation was made knew that the same was untrue and false and that the said patients were not attended by female nurses but on the contrary were attended by male attendants; that the complainant relying upon the truth of said representation did pay to the defendant the sum of $50.00 for services to be rendered to the mother of the complainant, one Rebecca Valustein, whereby as the result of the false pretenses the complainant removed her mother from said "Home" and as a consequence complainant was cheated and defrauded out of said sum.

No motion to quash the information was made. Motions for a new trial and in arrest of judgment were overruled and judgment entered on the finding. No report of the proceedings nor of the evidence was furnished this court and the defendant raises three points:

PEOPLE [illegible]

[illegible] Defendant in Error,

[illegible]

ROBERT [illegible],

Plaintiff in Error.

[illegible]

MR. JUSTICE [illegible]

[illegible] to the municipal court. The [illegible] people quality of a [illegible] judgment on the [illegible].

The information [illegible] maliciously, [illegible] that the defendant "did [illegible] and that the [illegible] by remonstration [illegible] that the said [illegible] contrary [illegible] relying [illegible] the sum of [illegible] complainant, one [illegible] false pretenses [illegible] said sum.

[illegible] a new trial [illegible] entered on the [illegible] evidence [illegible] points:

1st. That the information upon which defendant was found guilty and sentenced does not charge a crime;

2nd. That the court erred in overruling the motion in arrest of judgment;

3rd. That the court erred in overruling the motion to vacate the judgment.

A false pretense is such a fraudulent representation of an existing or past fact, by one who knows it not to be true, as is adapted to induce the person to whom it is made, to part with something of value. It may relate to quality, quantity, the nature or other incident of the article offered for sale, whereby the purchaser, relying on such false representation, is defrauded. Jackson v. The People, 126 Ill. 139.

It will be noted that the information in this case is inartistically drawn. A part of the information reads: "that the patients to be lodged in said nursing home were attended by female nurses." The verbs used in that clause do not agree. One is future tense and the other is past tense, which results in making an inconsistent statement.

The information further charges that "the complainant relying upon the truth upon the said representation did pay to the defendant the sum of Fifty Dollars, for services to be rendered to the mother of the complainant." As before stated no motion to quash was made and defendant evidently knew what was meant and was content to proceed to trial upon the information and charges contained in the complaint.

In the case of People v. Donaldson, 341 Ill. 370, at page 371, in speaking of the sufficiency of indictments, which by analogy would include informations the court said:

"Paragraph 716 of chapter 38 (Smith's Stat. 1929, p. 1061,) provides: 'Every indictment or accusation of the grand jury shall be deemed sufficiently technical and correct which states the offense in the

1st. [illegible] the indic[illegible]

guilty and contend [illegible]

2nd. That [illegible]

arrest of judgment;

3rd. That the court [illegible]

vacate the judgment.

A false pretense is such a [illegible] of an existing or past fact, [illegible] adapted to induce the person to [illegible] thing of value. It may result [illegible] other incident of the [illegible] purchaser, relying on such [illegible] Jackson v. The State, [illegible].

It will be [illegible] instinctively drawn. [illegible] pretense to be false [illegible] nurse." The verbs used [illegible] tense and the other is past [illegible] inconsistent state[illegible].

The later action [illegible] relying upon the truth [illegible] defendant the [illegible] matter of the complainant." [illegible] made and defendant [illegible] proceed to trial [illegible] complaint.

In the case of Young v. [illegible] 271, in speaking of the sufficiency [illegible] would include information [illegible]

"Paragraph 216 of [illegible]

'Every indict[illegible] sufficiently [illegible]

terms and language of the statute creating the offense, or so plainly that the nature of the offense may be easily understood by the jury.' Where a statute clearly defines an offense, an indictment charging the offense substantially in the language of the statute is sufficient, and one good count in an indictment is sufficient to sustain a verdict. (People v. Lloyd, 304 Ill. 23.) An indictment is sufficient if the defendant is so notified of the charge as to be able to prepare his defense and the jury can understand the offense and the court pass sentence in case of conviction. (People v. Cohen, 303 Ill. 523; Glover v. People, 204 id. 170.) * * * In People v. Cohen, supra, on page 525, it was said: 'Great niceties and strictness of pleading should only be countenanced and supported when it is apparent that the defendant may be surprised on the trial, or unable to meet the charge or make preparations for his defense for want of great certainty or particularity. (Canady v. People, 17 Ill. 158.) The criminal law is fast outgrowing those technicalities which grew up when the punishment for crime was inhuman and when it was necessary for the courts to resort to technicalities to prevent injustice from being done. Those times have passed, for criminal law is no longer harsh or inhuman, and it is fortunate for the safety of life and property that technicalities to a great extent have lost their hold;"

In the light of this language and having in mind the complaint upon which the defendant went to trial, the question arises, of what rights was he deprived? The court acting in place of the jury evidently understood the charges and defendant was not surprised. As before stated, we have no evidence before us as to what occurred at the trial, and as was said in the case of People v. Rosenberg, Appellate Court No. 22169 (opinion not reported in full):

"Under such circumstances it will be presumed that there were proceedings before the court sufficient to sustain the judgment."

From a review of the limited record before us we cannot say that the defendant was deprived of any right and we must presume that the judge heard sufficient evidence upon which to base the finding of guilty, no objection having been made to the charges in the information. As to the other points made they are merely technical and without merit.

For the reasons herein given the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

HALL, P.J. AND HEBEL, J. CONCUR.

40135

BEN MAMMINA, doing business as BEN'S TRI STATE MOTOR EXPRESS,

Appellee,

v.

HOMELAND INSURANCE COMPANY OF AMERICA, a corporation,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

297 I.A. 636[4]

MR. JUSTICE DENIS E. SULLIVAN DELIVERED THE OPINION OF THE COURT.

A judgment was entered in the Municipal Court in favor of plaintiff for the sum of $1650.00 for damages to plaintiff's automobile truck which was damaged by fire and which was covered by a policy of insurance issued by defendant. This cause was formerly before the trial court where a judgment was entered against the plaintiff and when the cause came before this court on appeal, the judgment of the trial court was reversed and the cause was remanded for a new trial. It is from the judgment entered in the second trial that the defendant now brings this appeal.

It appears from the evidence that on February 11, 1935, said vehicle was involved in an accident near Anderson, Indiana, where it collided with the locomotive of a Big Four train and the truck burst into flames as a result of the collision and the truck and trailer were destroyed by the fire.

By stipulation the former record is incorporated in the record in this case with the reservation by the defendant to the right to introduce any additional testimony deemed necessary without being bound by any rulings made at the first trial and with this single addition, the evidence in this case is the same as presented to this court at the time the case was formerly here on appeal.

When this case was before us for the first time, the opinion written at that time stated:

"The terms used in the contract in question are not restrictive in any way, and when we consider this occurrence, the language is so broad that the Insurance Company in insuring the plaintiff to pay loss arising from any cause resulting in the fire, assumed the burden."

No question is raised as to the terms of the policy, and that the truck was insured against fire without any reservations. When the case was formerly before us for consideration we indicated in substance that the plaintiff was entitled to recover. The subsequent hearing is nearly all a contested question of fact as to the values of the property before and after the collision with the locomotive.

This cause was heard by an experienced trial judge and he made allowances and deducted such amount as he considered fair and just in arriving at the proper sum owing as damages. Having seen and heard the witnesses testify, he was in a better position to determine such a question of fact than is a court of review. No serious legal question is involved and we believe the trial judge was substantially and in detail correct in his determination as to the amount that should be recovered.

There being no error of sufficient importance to cause us to reverse this case, the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

HALL, P.J. AND HEBEL, J. CONCUR.

39968

LE ROY ENGLES, Successor Trustee,
Appellee,

vs.

THOMAS A. MURRAY et al.,
Defendants.

On Appeal of KATHRYN McKAY,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

25

297 I.A. 637

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Kathryn McKay, owner of a bond in a foreclosure proceeding, filed an intervening petition seeking the vacation of an order confirming the master's sale of the premises involved. This was denied and she appeals.

The bill to foreclose was filed September 22, 1932, and on December 22, 1936, decree was entered finding there was due to the holders of first mortgage bonds $46,428.42; the property was advertised for sale pursuant to the decree and was sold to Theresa A. Weismantel for $6194.81; the master's report of sale was confirmed February 23, 1937.

March 4, 1937, Kathryn McKay, as owner of one of the bonds, upon leave of court filed her verified petition objecting to the sale and asking that it be vacated and set aside. The main point of her argument is that the amount of the sale was grossly unfair and inadequate and that its confirmation was an abuse of the discretion of the chancellor which requires him to protect the interests of all the bondholders. Apparently the chancellor was impressed with this view and permitted the filing of the intervening petition and took evidence as to values and as to the possibility of obtaining a higher figure. It was shown that the premises were subject to unpaid taxes for eight successive years amounting to $10,970. The purchaser at the sale assumed these taxes, so that the amount of the

sale plus taxes is $17,164.81. In addition to this were unbilled taxes for 1937.

The premises are located at 1215-25 West 18th street, Chicago, fronting 124 feet on 18th street and 100 feet on Allport street; the premises are improved with a four story and basement brick building containing six stores, twelve four-room apartments and a theatre with approximately 900 seats; the building was constructed in 1892.

An appraiser produced by the intervening petitioner testified that the fair economic value of the premises was $32,350, with an annual income of $8700; this witness also calls the building a "fire hazard; that it is contrary to the present building laws of Chicago." As against the estimates of the appraiser as to the income the record shows that a tax receiver in possession of the premises for over a year had voluntarily returned possession to plaintiff for the reason that the premises were not self-supporting.

The attorney for the intervening petitioner was emphatic in offering to purchase the property for large amounts provided the sale was set aside. He first offered $40,000 clear of taxes, then after much talk offered $20,000 in cash with his check for $1000 as earnest money; the court inquired whether he would pay $20,000 and the taxes, to w ich counsel replied that the taxes could not be paid by the purchaser. The colloquy developed that this attorney also represented a rival theatre and he included in his proposition an offer to give the purchaser $800 a month rental for the theatre if they would pay $1300 a month for his theatre.

The trial court was at some pains to ascertain the facts and to pin the attorney for the intervening petitioner to some definite offer, but without success. It was shown that when the property was advertised for sale notice was given to all non-

depositing bondholders advising them of the time and place of the sale; that nobody appeared to object to the sale; that a Mr. Skodin was the owner of the bond now held by the intervening petitioner, Kathryn McKay, and was represented by the same attorney now representing the present owner, and although solicited, refused to attend any meetings of the bondholders. Subsequently the intervening petitioner bought this bond but her counsel declined to inform the court as to when she bought it, although apparently it was bought after the sale was confirmed. It would serve no useful purpose to narrate all that was said. There were constant questioning and statements, all tending to develop an offer of a definite amount from the attorney of the intervening petitioner.

It developed that, as stated by one of the counsel at the hearing, "this is a fight between rival theater owners *** The other theater owner comes into the picture, purchased the bond after the sale was confirmed just for the purpose of making trouble." The court evidently was of this opinion, for in explaining his reasons for refusing to disturb his order confirming the sale he said: "I have an idea that this whole thing is not on the square. It is a fight between private interests, and I think the court is just being fooled. That is my theory." The court was justified in making this remark and there was no abuse of discretion in refusing to vacate the order confirming the sale. As was said in Straus v. Anderson, 366 Ill., 426, 431-32, where the sale has been approved "Sales ** will ordinarily not be set aside because of inadequacy of price in the absence of proof of fraud or some irregularity in the sale. **...stability should be given judicial sales, and * courts would not void the same in the absence of fraud or some irregularity in the proceeding attendant upon the sale. In those cases the buyer has an interest or right in the property."
See also Chicago City Bank & Tr. Co. v. Johnson, 293 Ill. App. 564, 571.

The judgment is affirmed.

AFFIRMED.

Matchett and O'Connor, JJ., concur.

40026

MARIE A. WALSH and NELLIE G. WALSH,

vs.

EDWARD R. NEWMANN et al.

SAMUEL MASLON, JOHN GOLDBACHER and ESTELLE MALKIN, Intervening Petitioners,

Appellees,

vs.

ROY W. ALEXANDER and CORNELIA ALEXANDER,

Appellants.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

297 I.A. 637

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is an appeal from a foreclosure decree which followed the master's recommendations.

The original debt secured by the trust deed was $15,000, evidenced by thirty bonds of $500 each; the bonds were apparently sold to different parties and the decree found that plaintiffs Marie A. Walsh and Nellie G. Walsh owned bonds Nos. 11 to 16 and that there was due them the sum of $4451.33; that there was due John Goldbacher on bonds 17, 18, 19 and 21, with interest, the sum of $2967.55; that there was due Samuel Maslon on bonds 22 to 27 inclusive, with interest coupons, $4451.33; that there was due Estelle Malkin on bonds 29 and 30, with interest, the total sum of $1483.78; that there was nothing due to the unknown owners and holders of bonds. Defendants Roy W. Alexander and Cornelia Alexander appeal.

This case has been in this court before. (See abstract opinion in 290 Ill. App. 612.) From the opinion rendered in that case it appears that the master found the issues for the respective bondholders as stated above, but the chancellor sustained exceptions

to the report and entered a decree finding that if Maslon, Goldbacher and Estelle Malkin purchased the bonds they claimed to own, they did so after maturity and after the bonds had been paid; the decree recited that this finding was based on evidence heard by the court.

Upon appeal to this court it was held that the trial court had no right to hear additional evidence upon the hearing of exceptions to the master's report, and that if the trial court was of the opinion additional evidence should be taken the cause should have been rereferred to the master with directions to take further proof and file an additional report, citing Egan v. Egan, 244 Ill. App. 497, 504; the decree of the trial court was reversed so far as it affected the rights of these intervening petitioners and the cause was remanded with directions to either sustain or overrule exceptions to the master's report bearing upon the claims of the three intervening petitioners aforesaid, and if the trial court thought it necessary that additional evidence be heard he should order a rereference to the master with directions to take additional evidence and again report.

When the cause came before the trial court upon remandment all parties agreed not to introduce any further evidence and the chancellor heard the exceptions upon the master's original report. These exceptions were overruled and decree was entered as recommended by the master and as recited above.

Upon hearing before the master, on behalf of the plaintiffs and the respective intervening petitioners, the uncancelled bonds were introduced in evidence. This constituted prima facie proof of the ownership of the bonds. Boudinot v. Winter, 190 Ill. 394, 396; Foreman Trust & Sav. Bank v. Cohn, 342 Ill. 280, 287.

The defense asserted by the Alexanders was payment of these bonds. The first answer filed by these defendants asserted that

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the court.

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further [illegible]
244 Ill. [illegible]
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and [illegible]
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of the [illegible]
court [illegible]
should [illegible]
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and [illegible]
were [illegible]
the [illegible]
[illegible]

[illegible]

all sums over and above $6000 had been paid; an amendment was later filed in which they alleged that all bonds save two (which would be $1000) had been duly paid, and again they amended their original answer by striking out the figures $6000 and inserting in lieu $3000. These various and conflicting assertions tend to cast doubt upon the defense of payment.

Roy Alexander testified that he was in possession of the property under a contract of purchase; that he made payments to a man named Robert Kolliner, who took over the contract of purchase from Alexander's vendor; that in a law suit tried in the Municipal court in August, 1932, he saw in Kolliner's possession bonds Nos. 10, 28, 29 and 30, and 17 to 27 inclusive, and that he wrote these numbers on paper and that Kolliner said he had paid for these bonds out of rents received from the property.

The master was justified in disbelieving this testimony. It was for the most part hearsay. At the time of the hearing before the master Kolliner was dead, so could not be produced in rebuttal. As was said in the Foreman Trust case, above cited, the proof of payment by defendant must be clear and convincing. The master and court properly found that this testimony did not meet the prima facie case made by the introduction of the uncanceled bonds. The decisive question involved is one of fact and the evidence fully justified the finding.

Defendants say the decree appealed from is a nullity and that the only valid decree in the case is the former one from which an appeal was heretofore taken to the Appellate court; that the trial court entered an order dismissing that appeal, leaving the prior decree unappealed from. It is contended that this order of the trial court dismissing the appeal having never been appealed from, the original decree therefore stands in full force and effect. This matter has already been presented to this court

upon the prior appeal and the motion to dismiss the appeal was denied. We shall not interfere with this order.

Being of the opinion that the evidence amply supported the findings of the master and of the decree, and there being no error, the decree is affirmed.

AFFIRMED.

Matchett and O'Connor, JJ., concur.

upon the [illegible]
nied. [illegible]

the [illegible]
error, [illegible]

Batches [illegible]

39862

AMELIA P. WISE,
Appellant,

vs.

GEORGE PACKARD,
Appellee.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

27A

297 I.A. 637

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

On October 17, 1935, the plaintiff filed her complaint in which she prayed that she be decreed the right to redeem certain bonds held by the defendant and for an accounting with respect thereto. The defendant answered denying the equity of the bill, and by amendment pleaded also the Statute of Frauds. There was a replication, trial before the Chancellor and a decree on April 12, 1937, dismissing the complaint for want of equity. Plaintiff appeals.

Plaintiff at and prior to the time of the transactions out of which this suit arises was the wife of Charles A. Channell but shortly thereafter obtained a divorce and became the wife of I. L. Wise. The Channells, who had a home at Grand beach, Michigan, although at times living in Chicago, New York and other cities, had a daughter Emily who in 1929 was married to Frank H. Packard, a son of defendant. Prior to this law suit she divorced Frank Packard. Defendant, George Packard, for more than forty years has been a practicing lawyer in Chicago, living with his family at 436 Barry avenue. The Channells, husband and wife, were financially interested in the exploitation of an invention and corporations to develop the business had been organized in the United States, in England, in France and in Germany. The corporations each took on the name "O-Cedar Company," and were known as the German O-Cedar Company, the French O-Cedar Company, etc. After the marriage of Frank Packard and Emily C. Channell, daughter of plaintiff, the young

39865

AMELIA P. [illegible],

[illegible]

vs.

GEORGE [illegible],

[illegible]

R. [illegible]

[illegible] in which [illegible] bonds [illegible] thereto. [illegible] and by [illegible] replication, [illegible] 1927, [illegible] people.

[illegible] of which [illegible] shortly [illegible] Wife. [illegible] altogether [illegible] a daughter [illegible] of defendant, [illegible] Department, [illegible] practice [illegible] avenue. [illegible] in the [illegible] business [illegible] France and in [illegible] "O-Lecter [illegible]," [illegible] the French [illegible] Paxmont and [illegible]

couple went to Berlin, Germany, where Frank acted as the manager of the German company, which did not seem to prosper. The French company on the other hand was fairly prosperous. The evidence indicates that the French company was indebted to the Channells in the sum of $130,000 and about this time put forth an issue of bonds, a part of which the Channells agreed to accept in payment of the debt due to them. It was planned to use part of these bonds to obtain funds to meet the financial needs of the German company. There is no evidence that the defendant in its first stages knew anything about this plan. In response to cablegrams from the United States, Frank Packard and his wife in the autumn of 1930 embarked for America, and when the ship stopped at Cherbourg, France, the administrateur of the French O-Cedar company met them and handed to Frank Packard two suitcases filled with bonds of the French O-Cedar company, a part of which are the subject matter of this law suit. Frank receipted for the bonds in the name of Charles A. Channell.

Frank Packard and his wife arrived at the LaSalle street station in Chicago October 5, 1930. They were met there by Mr. Channell, and they at once took cabs to the Packard home, 436 Barry avenue. The evidence of the members of the George Packard family is that upon their arrival the suitcases containing the bonds were put under a bench in the hall; that after greetings had been exchanged Frank Packard asked Mr. Channell if he would care to see his French bonds, brought the two suitcases into the living room and laid them before him; that Mr. Channell opened the suitcases, made a casual examination, said he was glad to have the bonds in this country; that Frank then told Mr. Channell that he of course knew that he (Frank) was here "to raise money for the German O-Cedar company" and asked him if he could "have some of these bonds to raise this money;" that he would like to have

$15,000 worth; that Mr. Channell said in substance that was all right; that Frank went to a table and scribbled on a piece of paper and then said that according to the French exchange 375 of these bonds would be of the face value of $15,000, and asked if he could take them, to which Mr. Channell replied, "Yes"; that they both stooped down and began to count out the bonds, and Frank made the remark that they had better take such as would run in serial numbers, that it would be easier to handle them; that they then counted out 375 of the bonds; that Frank took them and put them on the table at the back of the room and then picked up a piece of newspaper and wrapped the bonds given to him in it and put them on a shelf in the hall closet; that he then came back and asked Mr. Channell what he wanted him to do with the rest of the bonds and Channell asked him if they would keep them there, that he had no place to put them; Frank said that was all right, took the 375 bonds out, closed up the suitcases which he put first on the floor under the hall bench, later in a closet upstairs. About 10 days or two weeks thereafter Channell called and took the suitcases away with him. The 375 bonds turned over to Frank Packard were retained by him until delivered by him to his father October 21st, as hereafter related.

On the other hand, the testimony of Charles Channell is that at this time he took all the bonds in the suitcases away with him to his Michigan home, where he delivered them to Mrs. Channell who afterward (on either the 12th or 19th of October) at the request of Frank Packard delivered these 375 bonds to him to be used in securing a loan in order to assist the German O-Cedar company. Charles Channell also denies the conversations at the Packard home with reference to these bonds as testified to by Frank Packard, George Packard and Mrs. George Packard. Testimony of the Packards (Frank, defendant and his wife, Mrs. George B.

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piece of [illegible]

and put [illegible]

back [illegible]

rest of [illegible]

there, [illegible]

right, [illegible]

put [illegible]

upon [illegible]

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drink [illegible]

of the [illegible]

Packard) is to the effect that continuously from October 5th until about the 21st Frank Packard was at their home and endeavoring in many places in Chicago to secure a loan of $10,000, using these bonds as security. The bonds were not listed on any exchange; they were foreign bonds, payable in foreign currency, and under the financial conditions existing at that time it was found impossible to obtain a loan on them. Frank finally approached his mother and requested her to get the defendant, his father, to make a loan on the bonds, which defendant declined to do; that later, urged by the son and mother, defendant said to Frank that while under no circumstances would he make a loan, he would buy the bonds for the sum of $10,000 and give back an agreement to resell them to Frank at any time within 5 years from that date at the same price that he was paying. Frank Packard agreed to this, and defendant wrote in long hand an agreement reciting the purchase and sale with option to repurchase, which he delivered to Frank; that Frank, Mrs. Packard and defendant went to the First National Bank, where Mrs. George B. Packard from her own box took securities which she used as collateral in borrowing $5000 which she turned over to Frank; that the defendant produced similar securities from his box with which he also borrowed $5000 from the bank, which he turned over to Frank, and that Frank at once went to the Foreign Department of the First National Bank in Chicago and cabled $5000 of these amounts to the German O-Cedar company.

Frank Packard's testimony is further to the effect that during the time he held these bonds prior to the arrangement with his father, he was in constant communication with Mr. Channell, and that when his inability to obtain money elsewhere became known he informed Mr. Channell that he was opening negotiations with his father; that Mr. Channell approved, urged him to do this and was fully informed both before and after the transaction of the terms upon which it had been made. This evidence is denied by Mr.

Channell and Mrs. Channell likewise denies knowledge which Frank gave evidence tending to show she possessed.

On the same day the arrangement with defendant was made and in defendant's office, Frank Packard dictated a letter of that date addressed to Mrs. Channell and signed by him, stating, it is to confirm "our verbal agreement that during the period that I am using the debenture bonds Etabs O-Cedar numbers 001501 to 001875 inclusive, I will undertake to pay the equivalent of the semi-annual interest as and when paid by the French Company." At the lower left hand corner of the letter appear the initials "GP-LJ". Defendant, George Packard, denies that he knew any such letter was written or had any knowledge of it until this controversy. Mrs. Channell testifies that while the two families were at the Packard home just immediately before Frank and his wife returned to Berlin, the letter was read by Frank to her in the hearing of his father. Other witnesses then present (including Frank) deny this and it seems improbable.

October 20, 1930, Frank Packard delivered to the defendant a writing of that date executed in the name of the O-Cedar Gesellschaft, M.B.H., by Frank, stating that in consideration of the sale to him of 188,000 francs debenture bonds, etc., for the equivalent of $5,000, the company agreed to repurchase the bonds on or before 5 years from date, at the sum of $5,000. The writing also guaranteed the payment of interest on these bonds. A similar instrument was delivered on the same day to Mrs. Packard. Neither defendant nor his wife requested the execution or delivery of these writings.

In January, 1931, plaintiff's then husband, Mr. Channell, filed a suit for divorce against her, and the testimony of defendant (uncontradicted) is that plaintiff came to defendant's house to talk with him about that matter. Defendant told her he could not take sides and referred her to another lawyer. Defendant says

Chamberlain [illegible]

gave evidence that [illegible]

[illegible]

and in defendant's [illegible]

date said [illegible]

to confirm "our [illegible]

using the [illegible]

indicative, [illegible]

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Defendant, [illegible]

written or [illegible]

Chamberlain [illegible]

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(and he is not contradicted) that plaintiff did not mention these bonds to him at that time. Defendant also testified (and is not contradicted) that plaintiff's former husband, Mr. Channell, came to defendant just before the divorce case was tried, very much perturbed about the case; that defendant suggested to Mr. Channell that he permit Mrs. Channell to get a divorce on her cross-bill and make a property settlement, to which Mr. Channell replied he had no property. Defendant then suggested that he had the French bonds, to which Mr. Channell replied that Mrs. Channell had taken the bonds out of their strong box at Grand Beach, Michigan. On a former occasion defendant says plaintiff came to his office with some of the bonds and told him she did not know what to do with them; that she got them from the house at Grand Beach and did not know where to put them. There was a man with her whom defendant did not know. The man carried a satchel. Defendant refused plaintiff's request to permit the bonds to be put in his safe. Thereafter Mr. Wise, the present husband of plaintiff, called at defendant's office and told him there was a possibility the bonds would be taken up by the French company and stated there was a plan to have all the bonds placed in escrow. Defendant told him that if the bonds were taken up they could have anything over $10,000, which belonged to defendant. Mr. Wise did not testify.

In 1933 Frank Packard asked defendant if he would be willing to put the bonds in escrow, and defendant replied that he would. February 13, 1933, defendant sent to Mrs. Wise a writing signed by Frank Packard whereby he assigned to her his right to purchase from defendant for $10,000, on or before October 21, 1935, these 375 bonds. On the same date defendant wrote plaintiff, stating that on October 21, 1930, Frank Packard sold him these French bonds; that he (defendant) paid him $10,000 for them; that he had given him an option to buy back these bonds at the same price, expiring in 5

(and he is not contradicted) [illegible] bonds to him at that time. [illegible] contradicted) that plaintiff's former [illegible] to defendant just before the [illegible] perturbed about the case; [illegible] that he permit are, although to [illegible] and make a property settlement, [illegible] had no property. [illegible] bonds, to which [illegible] the bonds out of their [illegible] former or again [illegible] some of the [illegible] them; that [illegible] know where to get [illegible] did not [illegible] plaintiff's [illegible] Therefore, [illegible] defendant [illegible] would be taken [illegible] plan to have [illegible] that if the [illegible] $10,000, which [illegible]

In 1936 [illegible] to put the [illegible] February [illegible] Frank [illegible] defendant [illegible] bonds. [illegible] October 31, [illegible] he (defendant) [illegible] option to buy [illegible] bonds [illegible] at the same price, expiring in [illegible]

years from that date; that he had now assigned that option to her, and that he (defendant) would recognize her as the assignee of that option and give her the same right to repurchase the bonds for $10,000 at any time before October 21, 1935.

February 2, 1934, defendant wrote plaintiff stating he had been advised by the French O-Cedar company and by the Northern Trust Company that bonds numbers 1501 to 1507, inclusive, had been called for payment; that he would receive for these bonds 7,000 francs, which would of course prevent his being able to respond in kind for those particular bonds should she exercise her option to repurchase all the bonds by October 21, 1935; that he would deduct from her option price of $10,000 the money he received for these 7 bonds, exclusive of interest to January 1, 1934, and would advise her of the exact amount he would credit when the transaction was completed.

February 10, 1934, defendant wrote plaintiff that he had just received from the Northern Trust Company as the equivalent of the 7,000 francs, $439.73, as per his letter of February 2, 1934; that the rate of exchange was $6.30 so she might credit on her option the sum of $439.73. These writings speak for themselves. At no time did plaintiff question the interpretation which these writings placed upon the contract between defendant and Frank Packard up to the time this suit was filed.

Plaintiff contends the decree should be reversed because she says that defendant knew that his son Frank did not own the bonds in question and knew that plaintiff was the owner thereof; that the alleged sale of the bonds by Frank Packard to defendant was in breach of faith and under the circumstances disclosed amounted to a fraud; that defendant, the buyer, having knowledge thereof was not a bona fide purchaser and therefore did not acquire title to the bonds. Plaintiff cites sections 52, 55 and 56 of the

Negotiable Instrument Act (Ill. State Bar Stats., 1937, chap. 98, pp. 2133-2134) and cases such as Bell v. McDonald, 308 Ill. 329, and Owens v. Nagel, 334 Ill. 96, construing these sections. The argument ignores the facts. Under the evidence it made little difference whether Charles Channell or plaintiff was in fact the owner of the bonds delivered to Frank Packard. Plaintiff testified that her husband Charles at the time of these transactions attended to all her business for her, and that she relied on him. Frank Packard's testimony is to the effect that he consulted with Charles Channell both before and after the arrangement was made with his father, and that Charles approved of it. The bonds were payable to bearer; they were not listed on any exchange. There was abundant evidence from which defendant would have been justified in believing that Frank Packard had entire authority to sell the bonds. Under the Negotiable Instrument Act in order to find defendant was not a holder in due course, it would be necessary to establish the fact that he took the bonds under circumstances which amounted to bad faith. The trial court did not so find, and this court can not hold that any such finding would have been justified.

Again, plaintiff contends that the bonds in question were delivered to defendant merely as security for a loan, and that the transaction between Frank Packard and his father, as a matter of law, amounted to a pledge of the bonds and not a sale of them. Manifestly, that question too involves an issue of fact as to what the actual intentions of the parties were. A court of equity would disregard the form of the transaction if the actual intention was shown to be to take the bonds as security for a loan. The undisputed evidence, however, is that defendant refused to make a loan to Frank Packard or to the German company, and told Frank why he refused to do so. In his zeal to raise the money for the German

company it is apparent Frank Packard failed to distinguish between a pledge to secure a loan and an absolute sale with an agreement to repurchase. Also it is perfectly clear his father understood the distinction, and that he at no time intended to make a loan or receive the bonds as a pledge and was very careful to conduct the transaction in a way that would negative any such intention. The undisputed evidence shows that the form of the transaction was that of a sale with option to the seller to repurchase, and whatever may have been the state of plaintiff's or her then husband's knowledge at the time of the transaction, it is perfectly clear that after the letters of defendant to her stating the nature of the transaction and enclosing the assignment of Frank Packard's rights thereunder to her, plaintiff could not have been ignorant as to what the real intention of the parties was. She asked for an assignment of Frank Packard's rights. She received it with a clear and precise statement of what those rights were. She acquiesced in that statement. The evidence shows that at that time she knew Frank Packard was unable to pay interest on any supposed loan. He had not been able to make good on his promise to her. For almost three years she acquiesced in the statement made to her in writing that the real transaction was a sale, not a loan with pledge of the bonds to secure it. She made no protest. It is manifest that as long as it was for her interest that the transaction be construed as an absolute sale, she was disposed to accept that interpretation of it. However, when the depreciation of the American dollar increased the dollar value of these bonds she was swift to seek advantage from the situation and to claim for herself a construction of the transaction that had never been within the contemplation of either of the parties. The transaction was intended to benefit the business in which plaintiff's family was interested. It is apparent that both she and her then husband were exceedingly

company it is [illegible]
a plan [illegible]
requirements. [illegible]
distinction, [illegible]
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transaction in [illegible]
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of a sale with [illegible]
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tion and [illegible]
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real interest [illegible]
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the [illegible]
appear [illegible]

anxious to obtain defendant's money. It is true, as plaintiff points out, that mere delay in asserting a right does not constitute laches. People v. Thomas, 361 Ill., 448; Brunotte v. DeWitt, 360 Ill., 518. But the question here is not of laches but rather what was the intention of the parties as shown by their contract and their own interpretation of it. In this kind of case the form of the written transaction is not controlling, and all the evidence tending to show the intentions of the parties is admissible and must be given due weight. We do not overlook the facts that the German company guaranteed to defendant the interest on these bonds; that defendant offered to place the bonds in escrow; or that the negotiations opened with the request of Frank Packard for a loan. Nor are we unaware of the rule of law that in a case of doubt whether a given transaction was intended as a sale or a pledge, the law will justify the conclusion that it is a pledge. 4 Corpus Juris 908; Schultz v. McCarty, 193 Ill. App. 318. If it can be said that the other facts tend to create a doubt, the acquiescence of plaintiff in the written interpretation made repeatedly to her after the transaction was completed would overcome any doubt. The controlling questions in the case are issues of fact. It is the unquestioned rule of law in this State that when a chancellor has heard the testimony in open court and had an opportunity to see the witnesses and listen to their testimony an Appellate tribunal will not reverse his findings of fact unless it can say that they are "palpably contrary to the weight of the testimony." Hadley v. White, 367 Ill. 406. We can not say so but on the contrary are of the opinion that the findings of the Chancellor on the issues of fact were justified by the evidence. It follows that plaintiff has not established her right to an accounting nor a redemption, and the decree is therefore affirmed.

AFFIRMED.

McSurely, P. J., and O'Connor, J., concur.

39878

SAMUEL W. FLEISHER et al.,
Appellees,

vs.

PIUS P. FLICK et al.,
(Marcus Weil, individually and as
Administrator de bonis non, etc., et al.,
Appellants.

APPEAL FROM SUPERIOR
COURT OF COOK COUNTY.

28A

297 I.A. 637

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This appeal is from two orders, one entered May 3, 1937, and the other July 8, 1937. The order of May 3 sustained demurrers to an amended cross-bill and dismissed it. By the order of July 8, 1937, the original bill was dismissed on plaintiff's motion. The appeal of cross-defendants was taken to the Supreme court on the theory that a freehold was involved but has been transferred to this court.

The original bill filed January 9, 1932, by the Chicago Title & Trust Company, as trustee, and Fleisher and others, owners of certain bonds, was brought to foreclose a trust deed executed by Emanuel Levy and Sarah, his wife, on November 9, 1915, conveying certain premises to secure the payment of the bonds. The bill alleged the original bond issue was for the amount of $55,000 of which $20,000 in amount had matured and were unpaid. The bill was in the usual form and prayed for foreclosure and other relief.

Marcus Weil, individually and as administrator de bonis non of the estate of Emanuel Levy, and others claiming an interest in the premises were made defendants and filed answers to the bill. February 27, 1937, Weil, etc., and others (defendants) filed a joint and amended cross-bill to which Fleisher and other plaintiffs and the heirs of Emanuel Levy were made cross-defendants. The cross-defendants filed general and special demurrers which were sustained and an order entered dismissing the cross-bill as already recited.

[illegible]

vs.

PIUS M. [illegible]
(Marcos [illegible] Lopez [illegible]),
Administrador de Tierras [illegible],
Al [illegible].

[illegible]

[illegible]

[illegible] and the [illegible] to an [illegible] 8, 1937, [illegible] appeal of [illegible] theory that a [illegible] this court.

The original [illegible] Title a [illegible] of certain [illegible] by [illegible] certain [illegible] leged the [illegible] which [illegible] in the [illegible]

[illegible] tion of the [illegible] in the [illegible] February 27, 1937, [illegible] and assented [illegible] the [illegible] defendants [illegible] and an order [illegible]

The amended cross-bill avers that the premises are improved by an apartment building constructed by Emanuel Levy in 1915; that cross-complainants supplied labor and material, most of which has not been paid for; that as an inducement to continue these supplies Emanuel Levy and his wife conveyed the premises to Frank C. Rathje by warranty deed dated January 20, 1916; that Rathje executed a deed declaring he held title for the use of cross-complainants in the respective proportions that Emanuel Levy was indebted to them, as evidenced by promissory notes dated January 7, 1916, which are unpaid; that Rathje has not conveyed as t e trust writing provided he should; that all the parties have knowledge of cross-complainants' interest; that Emanuel Levy died May 24, 1916, leaving him surviving parties named as his sole heirs; that Sarah Levy has since deceased; that the daughter heirs and their husbands claim that they own the premises; that the Levy heirs have paid off the balance due on the original mortgage so that it is no longer a lien; that cross-complainants filed in the Probate court the notes held by them for the indebtedness which existed up to the time of the Rathje deed, and that these claims with accrued interest thereon have been allowed; that a petition is pending in the Probate court to sell the property and to distribute the proceeds according to the rights of the cross-complainants, and that issue has been joined thereon; that proofs are now being taken on the issues raised by the original bill; that the interests of the cross-complainants are superior to those of complainants and other defendants, and that they are entitled to be declared owners.

The declaration of trust dated January 20, 1916, is incorporated in the amended cross-bill as Schedule "A" and an acceptance of the trust by Emanuel and Sarah Levy. There also appears in the cross-bill a schedule of the claims filed in the

[illegible]

proved by [illegible]

1915; [illegible]

of which was not [illegible]

these [illegible] to [illegible]

Frank O. [illegible]

Hattie [illegible]

cross-[illegible]

Levy was [illegible]

dated [illegible]

conveyed [illegible]

parties [illegible]

Emanuel Levy [illegible]

named as [illegible]

the daughter [illegible]

premises; [illegible]

original [illegible]

compl [illegible]

for the [illegible]

deed, [illegible]

been allowed; [illegible]

sell the [illegible]

[illegible]

therefor; [illegible]

the original [illegible]

are [illegible]

that [illegible]

[illegible]

corporated [illegible]

accept[illegible]

appears [illegible]

Probate court.

The cross-bill prays that any interest or property remaining in the Levys shall be sold to pay their claims; that an account be taken on the fractional participation of each and every of the cestuis qui trust, and that such sums may be decreed to be paid them out of the surplus of rents and proceeds from the premises; that Frank C. Rathje be required to deed over the premises; that the mortgage sought to be foreclosed be held to be paid and no longer a lien; that a certain Master in Chancery's deed to Joseph E. Hesser and H. F. Soden, issued in another mortgage foreclosure against this property, be set aside and declared void; that title be declared to be in Frank C. Rathje, free and clear of any and all claims; that other claims be held subsequent to the prior rights of cross-complainants; that subsequent liens be removed as clouds upon the title of Frank C. Rathje, and that complainants be decreed to pay cross-complainants' costs and expenses, and for general relief.

The brief of cross-complainants filed in the Supreme court asserts a freehold is involved, but the order of the Supreme court transferring the cause to this court settles this point contrary to their contention. They urge that the Civil Practice Act (which became effective January 1, 1934) is not applicable because the original bill was filed prior to that time. This point may be conceded, but is, we hold, immaterial. They argue that a demurrer to the whole bill or a general demurrer cannot be sustained if the bill is good for any part of the relief prayed, and authorities are cited to that effect. The demurrers here, however, are both general and special. They argue that the complainant should not have been allowed to dismiss his bill after the cross-bill was filed without the consent of the defendant, and cite cases which correctly state the general rule of law on this point. However, the order

Probate court.

[illegible]

ing in the [illegible]

court be [illegible]

or the [illegible]

be paid [illegible]

premises [illegible]

premises; [illegible]

paid and no [illegible]

deed to [illegible]

gage foreclose [illegible]

void; [illegible] title [illegible]

clear of [illegible]

to the [illegible]

be received as [illegible]

complainants [illegible]

peace, and [illegible]

the brief [illegible]

assert a [illegible]

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to their contention [illegible]

become [illegible]

original [illegible]

conceded, [illegible]

to the [illegible]

bill is [illegible]

are [illegible]

general [illegible]

have been [illegible]

without [illegible]

state the general [illegible]

dismissing the original bill was entered more than two months after the demurrers to the cross-bill had been sustained and the cross-bill dismissed. The point is therefore without merit. The controlling question in the case is whether the court erred in sustaining the demurrers of cross-complainants, owners and Levy heirs, to this cross-bill.

The demurrer of Fleisher and other owners of bonds challenged the cross-bill for want of equity, multifariousness, vagueness, ambiguity and uncertainty, and for that it shows another action pending for the same relief between the same parties in the Probate court. The demurrer of the heirs of Emanuel Levy challenged the cross-bill for the same reasons, and also because the prayers for relief are said to be inconsistent and repugnant to each other.

Fleisher and the Trust Company (complainants in the original bill) and all the defendants thereto were made cross-defendants. They insist the demurrers were properly sustained because complainants sought by the cross-bill to litigate an adverse title in a foreclosure proceeding and also say (assuming an adverse title was not set up) then the relief asked by cross-complainants could have been obtained under an answer to the original bill, and that in either case the order sustaining the demurrers was proper. We hold the cross-bill does set up an adverse title because it alleges a title in Rathje which it avers to be superior to all the right, title and interest of all cross-defendants. The cases unanimously hold that this will not be permitted in a foreclosure proceeding. Zitzer v. Polk, 19 Ill. App. 61; Bozarth v. Landers, 113 Ill., 181; Ennis v. Wolff, 194 Ill. 420; Parlin & Orendorff Co. v. Galloway, 95 Ill. App. 60-66; Holinger v. Dickinson, 189 Ill. App. 634. In Whitaker v. Irons, 300 Ill.254, the Supreme court held that a tax title adverse to that of the mortgagor might not be litigated. Cross-complainants say that these and numerous other cases cited

distinguish the [illegible]
after the [illegible]
cross-bill dismissed.
contributing [illegible]
searching [illegible]
heirs, [illegible]

The [illegible]
lenged [illegible]
vagueness, [illegible]
action pending [illegible]
proper [illegible]. The [illegible]
the cross-bill [illegible]
for relief [illegible]

Affirmed [illegible]
bill) and [illegible]
They insist [illegible]
ants sought by [illegible]
foreclosure [illegible]
not set up [illegible]
have been obtained [illegible]
in other cases [illegible]
hold the cross-[illegible]
a title in [illegible]
title [illegible]
hold that [illegible]
Ziegler v. [illegible]
Smith v. [illegible]
35 Ill. App. [illegible]
In Illinois v. [illegible]
title always [illegible]
Cross-complaint [illegible]

are all distinguishable from the instant case, and cite Dawson v. Vickery, 150 Ill. 398, which they say specifically covers the situation in this case in that it is there held that the determination of the right to the equity of redemption is a question pertinent to the relief prayed for in the original bill to foreclose, and the controversy to determine it was the proper subject matter of a cross-bill. In the last analysis cross-complainants rest their case upon the opinion in the Dawson-Vickery case. An examination of that case shows complainants filed their bill to foreclose a mortgage executed by E. D. and Kate Vickery. Dawson and Britton were made defendants, the bill averring they claimed an interest in the mortgaged premises. They answered asserting a conveyance by warranty deed from the Vickerys, who executed the mortgage. They alleged that the mortgage covered another 80 acre tract of land which complainants, with knowledge of Dawson's rights, had released. The defendants averred that this 80 acres should be first taken for the satisfaction of the debt, and filed a cross-bill setting up these facts and praying for this relief. The Vickerys answered the original bill and also filed a cross-bill against Dawson and Britton averring that they had secured the conveyance through false representation of the breeding qualities of a stallion given in consideration for the deed. They asked that the deed might be set aside. Vickery recovered on his cross-bill and Dawson and Britton sued out a writ of error in the Supreme court. The opinion points out that the complainants in the original bill were not made parties to the cross-bill of Vickery, and to the contention that the cross-bill was not germane to the original bill the court said it was because its object was to determine who had the equity of redemption. "It may" said the court, "be true that the complainants in the original bill had no interest in that question, but it does not follow that the cross-bill was not germane to the original bill." It appears from

are all distinguishable by [illegible]
Vickery, 108 Ill. 3[illegible]
situation in this case [illegible]
nation of the [illegible]
tinent to the point [illegible]
and the controversy to [illegible]
of a cross-bill. In the [illegible]
their case upon the [illegible]
tion of the case [illegible]
a mortgage [illegible]
were made [illegible]
the mortgaged premises [illegible]
warranty deed from the [illegible]
alleged [illegible]
which complain [illegible]
The defendants [illegible]
the satisfaction [illegible]
these facts [illegible]
original bill [illegible]
averring that they [illegible]
sentation of the premises [illegible]
tion for the [illegible]
Vickery [illegible]
a writ of [illegible]
the complainants [illegible]
cross-bill [illegible]
not [illegible]
object [illegible]
said the court [illegible]
had no [illegible]
cross-bill [illegible]

this opinion of the Supreme court that as a matter of fact a demurrer was sustained to a cross-bill by Dawson and Britton against the complainant in the foreclosure and the Vickerys. The case is therefore not for but against the cross-complainants.

The rule that a demurrer to the whole bill where a general demurrer cannot be sustained if the bill is good for any part of the relief prayed for is invoked, and Story on Equity Pleading, 10th Ed., p. 408, sec. 443, with numerous Illinois cases is cited. The rule is not questioned. But the record here presents a dilemma for cross-complainants in that if the amended cross-bill is held to set up an adverse title, then it is without equity for the reasons already stated, and if it does not set up such adverse title, then the relief prayed is available under answer, in which case also the cross-bill cannot be maintained. Piott v. Davis, 241 Ill. 434; Gardner v. Cohn, 191 Ill. 553.

Whether designed so to do, the effect of this cross-bill was to complicate, delay and impede the foreclosure proceeding. Such practice is not to be tolerated. Motions to dismiss the appeal in this court were made and reserved to the hearing. These will be denied. The orders appealed from will be affirmed.

AFFIRMED.

McSurely, P. J., and O'Connor, J., concur.

40116

UNITED NEWSPAPERS MAGAZINE CORPORATION, a Corporation,
Appellant,

vs.

UNITED ADVERTISING COMPANIES, INC., a Corporation,
Appellee.

) APPEAL FROM MUNICIPAL COURT OF CHICAGO.

297 I.A. 637

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by plaintiff from an order entered January 7, 1938, dismissing its suit of the fourth class filed August 17, 1937. The statement of claim demanded $322 with interest from March 18, 1936, said to be due for the publication in the March 8 and March 15 editions of "This Week," a newspaper supplement, of an advertisement of the Pedodyne Company at agreed rates. The statement averred that defendant "O. K.'d" the proof of the advertisement; that the agreed price was $322, and defendant failed and refused to pay. The statement was duly verified. Defendant appeared, requested and was granted several extensions of time in which to plead but filed no affidavit of merits. September 14, 1937, defendant made a motion to dismiss the suit for the reason, as alleged, that plaintiff is a corporation not authorized to do business in the State and, therefore, could not maintain the action. (Ill. State Bar Stats., 1937, chap. 32, Sec. 125, par. 157, p. 819.) The motion was supported by a petition verified by one of defendant's attorneys. The petition, after reciting previous proceedings, averred that the statement of claim did not recite that plaintiff was authorized to do business in Illinois; that the affiant had checked the certified list of foreign and domestic corporations so authorized, as compiled by the Secretary of State, and inquired of the Cor-

poration Department of the office of the Secretary of State in Chicago, and that both the examination and the inquiry failed to reveal that plaintiff was authorized. The petition set up section 125 of the statute verbatim and prayed the dismissal of the suit. Plaintiff filed an answer to the petition, which was duly verified, to which defendant did not reply, and no material facts stated in the answer were denied. The cause came on for hearing on the motion to dismiss, which was granted as heretofore stated.

Rule 308 of the Municipal court provides in substance that the provisions of the Civil Practice act except where in conflict or inconsistent with the rules, shall be applicable to all proceedings in the Municipal court. Section 45, par. 1 of the Civil Practice act provides that motions shall be used in place of demurrers, and par. 2 that where a motion to dismiss for insufficiency in law is made, the motion must specify wherein the pleading is insufficient. Sec. 40, par. 1 of the Civil Practice act provides in substance that pleadings must be specific, and par. 2 that every allegation except as to damages "not explicitly denied shall be deemed to be admitted."

Applying these rules to this record, it appears from an examination of the petition and verified answer that plaintiff is a corporation organized under the laws of New York with its principal office in New York City; that it is engaged in publishing a supplement to Sunday editions of various papers throughout the United States; that this publication is made in the State of New York, and that in connection with this business defendant solicits advertising throughout the United States by salesmen whose salaries are paid from the principal office in New York City and whose authority is limited by terms and conditions prescribed at that office.

Plaintiff rents a sales office at 360 N. Michigan avenue,

Chicago, for the convenience of its salesmen, keeps a small bank account in Chicago from which the rent of the Chicago office and office expenses, such as electricity, petty advances to salesmen, etc., are paid; the salary of all employees, including those connected with the Chicago office, are paid from the principal office in New York City; the salesmen of plaintiff have no authority to sign contracts for the corporation; all business solicited is taken subject to acceptance by officers of plaintiff in New York City and all orders for advertising and copying thereof are sent to New York. Bills of plaintiff are sent out from there and accounts for advertising are payable there, none payable in Chicago. By the answer plaintiff expressly denies that it is doing business within the State of Illinois within the purview of the statute invoked, but on the contrary alleges that it is doing an interstate business. It prays the dismissal of the petition and that defendant be required to plead to the merits.

This statute has been in force in this State for many years. Similar statutes exist in practically all the States and have been construed repeatedly. The defense is an affirmative one and when invoked the burden is upon the defendant to state facts making the statute applicable. Delta Bag Co. v. Kearns, 160 Ill. App. 93; Edward Lyman Bill, Inc. v. Leech, 211 Ill. App., 578; Richard Young Co. v. Meyer-Rudolph Shoe Co., 261 Ill. App. 327. That the statute may be applicable it is necessary first that it appear plaintiff is actually doing or transacting business within the State within the meaning of the statute. Second, that the transaction upon which the suit is based is not one in Interstate Commerce. These propositions are established by the cases above cited and by Bamberger-Stern & Co. v. Anderson et al., 207 Ill. App. 222; London Guaranty & Accident Co. v. Watte, 234 Ill. App. 497; Emcee Corporation v. George, 293 Ill. App., 240-45, and numerous

other cases cited in plaintiff's brief. These and other authorities are also to the effect that neither the mere bringing of a suit at law or equity, a single isolated transaction within the State, to which plaintiff may be a party, nor transactions within this State relating to the internal management of the foreign corporation, constitute doing business within the meaning of the statute.

Numerous cases under facts similar to those appearing have held that a contract such as here disclosed is one of Interstate Commerce to which the statute has no application. Cheney Bros.Co. v. Massachusetts, 246 U. S. 147; Lehigh Portland Cement Company v. McLean, 245 Ill. 326; Post Printing & Publishing Co. v. Brewster, 246 Fed. 321; Fletcher Cyclopedia Corporations, Perm. Ed., vol. 17, sec. 8403, p. 281.

Numerous other decisions are to the effect that where, as here, contracts must be submitted to the home office of foreign corporations in a foreign state for acceptance or rejection, and goods are shipped from the state in response to orders accepted, the transaction is in Interstate Commerce even though the foreign corporation maintains an office in the domestic state for the use of its agents and salesmen. Cheney Bros. Co. v. Massachusetts, 246 U. S. 147; Lehigh Portland Cement Co. v. McLean, 245 Ill. 326; Ajax-Grieb Rubber Co. v. Gray, 179 Ill. App. 377; The Automotive Co. v. The Metal Products Co., 327 Ill. 367; American Art Works v. Chicago Picture Frame Works, 264 Ill., 610. Other decisions hold that the fact the foreign corporation maintains an office in the local state from which it pays rent and incidental expenses (keeping a small bank account for that purpose) is immaterial. Pocahontas Fuel Co. v. Massachusetts, 218 Mass. 558; American Art Works v. Chicago Picture Frame Works, 264 Ill., 610; The Journal Co. of Troy v. F. A. L. Motor Co., 181 Ill. App. 530.

other cases of a [illegible] right. I see [illegible] notices are also [illegible] law or equity, [illegible] to which jurisdiction [illegible] relating to the interest [illegible] constitute doing [illegible] or the courts.

Numerous cases [illegible] hold that a contract [illegible] Commerce to [illegible] [illegible] v. Massaro Realty, 241 [illegible] 147; [illegible] Molesan, 219 Ill. 302; [illegible] v. [illegible] 246 Ind. 321; Interest Jurisdiction [illegible] 17, sec. 8403, [illegible].

Numerous other radicals [illegible] here, contracts must be not [illegible] corporations in [illegible] goods are shipped from [illegible] the transaction is [illegible] corporation [illegible] of its [illegible] U. S. 147; [illegible] 246 U. S. 147; [illegible] Ajax-Grieb Rubber Co. v. [illegible] 172 Ill. [illegible] 370; The Auto Utility Co. v. The [illegible] 370; [illegible] v. Chicago Electric [illegible] 304 [illegible] 322; [illegible] that the [illegible] in the local state [illegible] industrial expenses (keeping a small bank [illegible] is immaterial. Rose Mfg. Fuel Co. v. Massaro Realty, 213 [illegible] 375; American Art Works v. Chicago Electric [illegible] 304 [illegible] 320; The Commerce Co. of Tiny v. [illegible] 1 Ill. App. [illegible].

Other cases hold that the soliciting of advertisements to be published by a foreign corporation in a foreign state does not constitute the doing of business within the state within the meaning of this statutory provision. Journal Printing Co. v. Inter-Ocean Newspaper Co., 167 Ill. App. 274; System Co. v. Advertisers Cyclopedia, 121 N. Y. S. 611; American Contractor Publ. Co. v. Bagge, 91 N. Y. S. 73; International Transportation Assoc. v. DesMoines Morris Plan Co., 215 Ia. 1268; Fletcher Cyclopedia on Corporations, vol. 17, sec. 8488, p. 530.

These authorities (cited in plaintiff's brief) are not questioned by defendant. Defendant, however, undertakes to raise a question on the pleadings. It asserts (citing authorities) that the insufficiency of pleadings of a defendant cannot be raised for the first time in the Appellate court; that the general rule is that the judgment or decree of the lower court will be affirmed where the record is insufficient for the purpose of review of the error assigned; that in the absence of a stenographic report of proceedings or a statement of facts in a common law case, it will be presumed the evidence was sufficient to justify the judgment; that assignments of error must be based upon the record itself, not merely upon the argument of counsel, and that where no stenographic report of proceedings or statement of facts is filed the court can not go outside the common law record to determine if error was made in the lower court. Finally, defendant says that the question of whether a corporation is or is not doing business within a state is a question of fact. All these propositions (generally true) are not applicable to this record. This motion of defendant to dismiss was made on the pleadings and without filing any replication to the answer of plaintiff. No evidence was taken. As a matter of fact, the petition of defendant does not even state that plaintiff corporation is doing business in this State. The facts as stated in

the answer are admitted for the purposes of the motion, and the motion presented the single question of law as to whether admitting the facts stated to be true the motion to dismiss the suit should prevail. True, ordinarily the question of whether a corporation is or is not doing business within a state is a question of fact depending on the evidence. But that proposition is wholly immaterial where, as here, a defendant by motion submits the case to the court on the facts as stated in the pleadings. Such a motion raises a question of law. The Civil Practice Act, which is applicable, directs that the motion of the defendant shall specifically point out the respects in which the pleading of plaintiff is insufficient. Defendant did not comply with this requirement, but since the pleading was not objected to on that ground the point could not be raised here and it has not been raised.

We hold, as a matter of law, that the court erred in sustaining the motion of defendant to dismiss plaintiff's cause of action and in entering the judgment. The judgment is reversed and the cause remanded with directions to enter a rule on defendant to file an affidavit of merits, as required by the rules of the Municipal court.

REVERSED AND REMANDED WITH DIRECTIONS.

McSurely, P. J., and O'Connor, J., concur.

40281

PEOPLE OF THE STATE OF ILLINOIS,
Petitioner,

vs.

EDWIN BOYER,
Respondent.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

30 A

297 I.A. 638

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This appeal is from an order entered May 13, 1938, allowing the motion of Boyer to correct errors of fact in a judgment entered on May 27, 1937. (Ill. State Bar. Stats., 1937, chap. 110, par. 196, sec. 72, p. 2406.) A new trial was granted. Boyer was arrested May 12, 1937, charged with the commission of an offense in that he stole two automobile keys and three house keys in violation of the statute (Ill. State Bar Stats., 1937, chap. 38, sec. 1, par. 389.) He was arraigned, pleaded guilty but later changed to a plea of not guilty, waived trial by jury and submitted his case to the court. Testimony was heard, defendant found guilty and sentenced to pay a fine of $1.00 and to serve in the House of Correction for a period of one year. At the time of the alleged offense defendant was on parole from the penitentiary at Joliet and since serving his time of one year has been returned to the penitentiary.

The ground of defendant's motion was that he was unfamiliar with court proceedings, was not represented by counsel or informed of his right of trial by jury, had no opportunity to have testimony in his own behalf introduced nor to offer any defense. He avers he had a good defense which was not presented, in that for 16 years past he has suffered from a disease known as epileptic fits and while in these fits is completely out of his mind; that he was seized by one of these fits the day of his arrest and committed the alleged acts constituting the crime while in that

PEOPLE [illegible] LAMBERT,
[illegible],

vs.

EDWIN YOUNG,
respondent.

[illegible] Ill. [illegible]

[illegible] Defendant.

[illegible] 338

Mr. Justice [illegible] delivered the opinion of the court.

[illegible] appeal in [illegible] criminal [illegible] May 1, 1930, allowing the motion of defendant to [illegible] verdict of not in a judgment entered on [illegible] May [illegible], 1927. (Ill. [illegible] Ill. [illegible], 1927, chap. 110, par. 1[illegible], sec. [illegible], p. [illegible]) [illegible] which was [illegible]. Boyer was [illegible] May 12, 1927, [illegible] the commission of an offense in [illegible] and three counts charging keeping in violation of [illegible] (Ill. [illegible] Ill. [illegible], 1927, chap. [illegible], p. [illegible]) [illegible] charging, [illegible] guilty but later [illegible] or not guilty, waived trial by jury and elected [illegible] court. Sentence was [illegible] defendant fined [illegible] and sentenced to pay a fine of $1,000 and to serve in the house of correction for a period of one year. [illegible] time of the alleged offense [illegible] on parole from the penitentiary at Joliet and since expiration of one year has been returned to [illegible].

[illegible] with court [illegible] not [illegible] by [illegible] informed of his right of [illegible] opportunity to have testimony in [illegible]. [illegible] or other [illegible]. [illegible] avoid [illegible] not [illegible], [illegible] for 16 year [illegible] from a license [illegible] a religious [illegible] in [illegible] out of his [illegible]; that he was [illegible] of [illegible] arrest [illegible] [illegible] the [illegible] [illegible] that

mental condition; that he was in the same condition when arrested and while held by the police. Defendant averred he had been treated by reputable physicians in Chicago for his ailment and if granted a new trial these physicians would testify as to the state of his health and mind on occasions when these attacks came on him. He averred that if the court had been advised the judgment would not have been entered.

The State's Attorney filed a motion to dismiss the petition on the ground that it did not state facts but mere conclusions; that the alleged facts were known to the petitioner at the time of the trial and through his own negligence were not presented to the court; that he had not been prevented at the time of the trial from presenting the facts either by duress, fraud, excusable mistake or ignorance, and that the petition was in other respects insufficient. The court overruled the motion to dismiss and granted defendant a new trial, as already stated.

No appearance has been filed in this court for petitioner. A brief has been presented in behalf of the People which contains eight points stating propositions of law applicable to proceedings of this nature with numerous citations of authority. However, the points made are not argued, and no statement is made showing wherein the authorities and the propositions cited are applicable to this record. Rule 7 of this court (among other things) provides:

"The argument shall be confined to discussion of the points made and cases cited in the brief, and no others, and in the order in which the points are made. A point made but not argued may be considered waived."

Only a few days remained of the term for which defendant was sentenced at the time the order granting a new trial was entered. He has now served the full time and has been returned to Joliet. It seems appropriate that the above provision of Rule 7 should be applied.

The judgment is affirmed.

AFFIRMED.

McSurely, P. J., and O'Connor, J., concur.

39837

JESSE A. ROTHSCHILD, SAMUEL I. KARGER, SYDNEY W. KARGER, VICTOR KUNZER, Jr., FULLER M. ROTHSCHILD and JOHN S. KARGER, Copartners Doing Business as ROTHSCHILD & COMPANY,

Appellees,

vs.

ALBERT SABATH,

Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

297 I.A. 638

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiffs, members of the Chicago Board of Trade who were engaged in the brokerage business, brought suit against defendant to recover $1324.64, with interest, being a balance claimed due for the purchase and sale of wheat by plaintiffs for defendant. The defense interposed was that the purchase and sale of the wheat were mere pretended transactions; that it was the understanding between plaintiffs and defendant that there would be no delivery of the wheat, but that the differences between the purchase and sale price would be settled, and therefore the pretended contracts were gambling contracts and void within the meaning of sec. 130, chap. 38, Ill. Rev. Stat. 1937.

There was a jury trial, a verdict in plaintiff's favor and judgment for $1358.26. Defendant's motion for a new trial was allowed and this court allowed plaintiffs' petition for leave to appeal. Afterward, upon consideration, we affirmed the order awarding the new trial (opinion filed December 16, 1935.) The case has again been tried and again there was a verdict in plaintiffs' favor on which judgment was entered for $1599.73. Defendant appeals. The amount of the judgment is made up of $1283.39 principal and $316.34 interest. During the trial, on motion of plaintiffs the court permitted them to amend their statement of claim by strik-

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ing out a paragraph which alleged that plaintiffs had, at the request of defendant, purchased "grain offers" and had advanced or paid to the sellers of such offers the cost price, and the claim for this item was $41.25, thereby eliminating that amount from their claim, $1324.64, leaving the amount the jury awarded them for principal, $1283.39.

Plaintiffs' offered evidence tended to show that the purchase and sale of the wheat (40,000 bushels) were real and not pretended sales, and that it was not their intention that no delivery of the wheat should be made or accepted, nor that it was the intention of both parties that the settlements should be made only on the market differences. On the other side, defendant's evidence was to the effect that he had been dealing in wheat transactions with plaintiffs acting as broker for some time, and that it was understood and agreed between them that no wheat would be delivered or received, but that settlements would be made on market differences.

The evidence on the second trial is substantially the same as that on the first trial, and this seems to be agreed upon by counsel for both parties except that on the second trial plaintiffs put in evidence tending to show that they actually bought and sold the wheat for defendant, and in so doing dealt with other grain brokers on the Board of Trade. Written memoranda to this effect are in the record, and plaintiffs' evidence is to the effect that defendant was notified of this fact each time a purchase or sale was made. The jury was specifically instructed that if it found from the evidence "defendant had no intention to take delivery of the actual grain and it was the intention of the parties to settle their accounts by payment of differences," the transaction would be gambling and no recovery could be had. The jury found in favor of plaintiffs; and while we said in our former opinion, "We think the great weight of the evidence is that both parties intended that

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no wheat should be delivered, but instead there should be a payment of the difference between the purchase and sale price of the wheat," yet we are clearly of the opinion that under the evidence in the record before us, bearing in mind that two juries have passed upon the question in plaintiffs' favor, we would not be warranted in disturbing the verdict on the ground that it is against the manifest weight of the evidence.

Defendant contends that the court erred in admitting, over his objection, plaintiffs' exhibits 17 and 26. Exhibit 17 purports to be a memorandum made by one of the brokers employed by Daniel F. Rice & Co., who at plaintiffs' request bought 10,000 bushels of wheat for defendant at 56¢ a bushel; and it is said that the exhibit is in the handwriting of Dean Baker, one of Rice & Co.'s employees, but he was not produced and no one saw him making the memorandum. We think the exhibit was properly admitted. There was testimony that it was written by Baker, a broker employed by Rice & Co. The weight to be given to it was for the jury. Moreover, there was no dispute in the record about the number of bushels of wheat involved nor as to the price paid or received. The statement of claim gives all the items, the number of bushels claimed to have been bought and the price paid, as well as the selling price of it; and there is nothing in the affidavit of merits that questions any of these figures. In the former opinion, after we set forth the purchases of the wheat and the price paid, as well as what it sold for, we said, "There is no dispute about the figures, but the defendant contends that plaintiffs did not, in fact, buy wheat for him," etc. The same situation appears in the record now before us. Obviously defendant was in no way injured by the lack of more proof.

As to Exhibit 26: A witness for plaintiffs testified that after each purchase and sale of wheat she sent to defendant "confirmations" of each by mailing statements on blanks used by plaintiffs

no wheat should be delivered, [illegible] on a payment of the difference between the [illegible] of the [illegible]," yet we are clearly of the [illegible] not in the record before us, nothing [illegible] the question in plaintiff's favor, [illegible] disturbing the verdict [illegible] feet weight of the [illegible].

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in their business, showing the amount of each purchase and sale. At the bottom of each there was printed, "The above transaction made by us for you was made in accordance with and subject to the rules, regulations and customs of the Grain Exchange or Association wherein made, and the rules, regulations and requirements of its Board of Directors *** It is further understood that actual receipt of the property and payment thereof is contemplated," etc.

Defendant denied that he had received any of the confirmations. Plaintiffs offered in evidence carbon copies of these confirmations typed on ordinary yellow paper, but there was no printed matter on the carbon copies. We think it clear that the exhibit was properly received. The weight was for the jury. Counsel cite Weare Comm. Co. v. People, 209 Ill. 528, where similar printing was involved. The court there said (p. 544): "the act of the defendant in printing in each statement it issued language purporting to bind the customer to the proposition that, in making the deal he contemplated an actual delivery, were unusual precautions. *** The purpose of these precautions seems to have been to give an outward appearance of an intention to deliver and receive the property." See also People v. Viskniskki, 255 Ill., 384. Undoubtedly counsel for defendant in his argument brought this view to the attention of the jury, and it was for the jury to decide.

Complaint is also made that the court erroneously sustained defendant's objections to questions put to two of plaintiffs' witnesses, Mr. Freshman and Fuller Rothschild, one of the plaintiffs, by counsel for defendant on cross examination. Some of the questions asked the witness Freshman on cross-examination were as to the color of defendant's wheat which was purchased, and how much space 20,000 bushels of it would occupy. We think there was no error in this regard. Rothschild testified as to the amount due

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from defendant as shown by plaintiffs' records. It was objected that the books were the best evidence, but the court let the witness answer, giving the amount claimed as well as the computation of interest on it. We think the ruling was erroneous, but since, as above stated, there was no dispute about the number of bushels of wheat claimed to have been purchased and sold and the various prices, the error was not such as would warrant us in disturbing the verdict and judgment.

Complaint is made that the court erred in giving an instruction requested by plaintiffs as to what the jury should consider in passing on the question of the preponderance of the evidence where the number of witnesses is uneven. But only one sentence of the instruction is in the brief; the instruction should be set out in full. Zorger v. Hillman's, 287 Ill. App. 357. We prefer, however, to pass on the instruction. It was in the ordinary form where the number of witnesses testifying on one side is larger than those testifying on the other. The instruction is quite lengthy, and concludes: "The element of numbers should be considered, with all the other elements already herein suggested, for whatever in the judgment of the jury that element is worth, and the evidence of the smaller number cannot be taken by the jury in preference to that of the larger number unless the jury can say, on their oaths that it is more reasonable, more truthful, more disinterested and more credible." The identical instruction was held not to be reversibly erroneous in Gage v. Eddy, 179 Ill. 492, but it was not approved. We think the instruction should not have been given. Newcomb v. Chicago City Ry. Co., 192 Ill. App. 74. Plaintiffs had a greater number of witnesses than defendant. A proper instruction on this question was given at defendant's request, and while this did not cure the error, we think, upon a consideration of the entire record, the error was not of such a character as to warrant inter-

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[illegible] there [illegible] mere answer, [illegible] tion of [illegible] since, is above [illegible] there is no [illegible] but also of [illegible] various [illegible] disturbing [illegible] verdict [illegible].

[illegible] attention, [illegible] should consider [illegible] evidence [illegible] assistance of the [illegible] should be [illegible]. We prefer, however, [illegible] ordinary [illegible] is larger than [illegible] quite [illegible] considered, [illegible] for whatever [illegible] the evidence [illegible] preference [illegible] their [illegible] terested [illegible] institution was held not to be [illegible] not [illegible] newspaper [illegible] greater [illegible] on this [illegible] institution [illegible] fig not [illegible] record, [illegible]

ference on our part.

A further contention is made that the court erred in refusing to give two instructions requested by defendant. The first requested the court to instruct the jury that if it found the transactions involved were gambling transactions and therefore void, the evidence would "not support an account stated, and under those circumstances you are instructed to find for the defendant." And the other refused instruction sought to have the jury instructed that if it found from the evidence, "that any part of the account stated" consisted of gambling transactions, then it should find for the defendant. The jury was not told by any instruction what constituted an "Account Stated" and therefore it was no error to refuse to give them. Moreover, we think the instructions were properly refused because they were covered by others given at defendant's request. By given instruction 5 the jury was told that if it found the transactions between the parties were gambling transactions they could not "form the basis of a binding account stated." Instructions 6 and 7, given at defendant's request, were substantially to the same effect.

The judgment of the Municipal court of Chicago is affirmed.

JUDGMENT AFFIRMED.

McSurely, P. J., and Matchett, J., concur.

[illegible]

39920

AMICH SECURITIES COMPANY, INC., a Corporation,
Appellee,

vs.

MELVIN L. EMERICH,
Appellant.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

324

297 I.A. 638

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

August 3, 1931, plaintiff brought an action against defendant to recover damages for the alleged breach of a written contract. The case was tried before the court without a jury, there was a finding and judgment in plaintiff's favor for $38,700, and defendant appeals.

The record discloses that October 9, 1928, Ames, Emerich & Co., an Illinois corporation, (whose name has since been changed to Amich Securities Co., Inc.) plaintiff, entered into a written contract with defendant which recited that on March 31, 1923, plaintiff was indebted to the National Bank of the Republic of Chicago for $175,000, payment of which was secured by depositing with the bank $175,000 of first lien notes of the Southern Gas and Electric Co., which notes matured July 1, 1929, with the right to extend the time of payment of such notes to July 1, 1931; and that in consideration of one dollar and other good and valuable considerations it was agreed (1) that defendant, Emerich, would pay to plaintiff $64,500 in cash plus accrued and unpaid interest on the notes, upon plaintiff delivering to him $64,500 face value of the Southern Gas & Electric Co's first lien notes held as collateral by the bank; that defendant's liability to pay for these notes should not extend beyond July 1, 1931, and plaintiff was required to give defendant 3 days written notice that it elected to deliver the collateral notes to defendant. (2) That when

interest was collected on the collateral notes it should be applied toward the payment of the interest on the indebtedness to the Bank; and in the event the interest collected on the $64,500 of notes was in excess of the proportion of the total interest payable on the loan to the Bank, such excess should be paid over by plaintiff to defendant; and in the event such interest was less than the proportionate amount of interest due the Bank, defendant was to pay such deficiency.

Plaintiff contends that June 20, 1931, it notified defendant in writing that it would expect him to take up and pay $64,500 of the notes; that two or three days thereafter defendant said he was financially unable at tha time to pay the $64,500, and that by reason of such statement by defendant plaintiff was excused from the tender or delivery of the notes to defendant. On the other side, defendant's position is that plaintiff "did not perform the conditions required by the contract to be first performed by him before defendant became obligated to purchase the notes;" that he did not waive the obligation of plaintiff to deliver or tender delivery of the notes before July 1, 1931; and therefore defendant was not liable. And defendant's further contention is that plaintiff cannot recover under its declaration, which consisted of the second and third special counts and the common count.

Did plaintiff comply with the terms of the contract so far as to put defendant in default in failing to take up and pay for $64,500 face value of the Gas company's first lien notes, although plaintiff made no actual tender of the notes? The trial Judge found that it did, and unless we are able to say such finding is against the manifest weight of the evidence the judgment cannot be disturbed on that ground.

The evidence shows that June 20, 1931, plaintiff wrote de-

fendant a letter, which he received in due course, saying: "We write to advise you that as we have been unable to sell or refinance the Southern Gas & Electric Company under present market conditions we will have to call on you on July 1 to take up and pay for your share of the First Mortgage bonds, (notes) in accordance with contract entered into between you and ourselves in connection with the settlement for purchase of your stock." The letter went on to say that a balance sheet "and three-years comparative earnings statement" of the Gas company were enclosed; that the Gas company had made excellent progress during the past year and was able not only to pay 6% on the capital invested but also to finance all necessary extensions out of its own funds; that in view of the general conditions in Florida (where the Gas company property was located) and the conditions throughout the United States for the past two years, plaintiff thought the showing was remarkable and justified its original faith in the Gas company. "We have not yet been able to find out from the National Bank of the Republic just what attitude they are going to take with Mr. Reed (who seemed to be the man in authority at the property of the Gas company in Florida) in connection with the extention of these First Mortgage bonds (notes). It is of course necessary that all owners of the bonds agree. * * * Mr. Reed has offered to reduce the First Mortgage from approximately $437,000 to $400,000 if he can obtain a one-year extension on the $400,000 with the provision that if he makes a further substantial reduction at the end of that year the notes will be extended for one year or more. It seems to me that some proposition along these lines is very fair and should be satisfactory to all concerned." Two or three days after this letter was mailed, Marshall Forrest, executive vice-president of plaintiff at the time in question, called on defendant, Mr. Emerich, at his office and they talked about defendant

taking up and paying for the $64,500 of notes. There is some dispute as to what was said at that time. Mr. Forrest testified that Mr. Emerich called him on the telephone, said he had received the letter of June 20 and wanted him to come over and talk to him about it; that he went over to Mr. Emerich's office; that Emerich inquired what could be done about the matter and that, "I said, 'There isn't anything that can be done. The bank insists upon getting their money'"; that Mr. Emerich said, "Well, I simply can't do it. All my money is tied up in the partnership in which I am actively engaged now, and there is no place I could get a loan on those bonds at this time;" that he said, "Well, I just cant do it; there is no possibility of raising $67,000 at this time."

As to what was said at that time Mr. Emerich testified: "Mr. Forrest came over to see me, and he told me that the bank had asked for payment of the loan. *** I said, 'Well, it is rather difficult at this time. Most of my - or my money - is tied up in my partnership'; that it would be quite difficult to get a loan on these bonds but he would see what he could do; that Mr. Forrest said he was trying to get an extension from the bank but he was doubtful he would get it; "I did not at any time during the conversation say, 'Well, I just can't do it; there is no possibility of my raising $67,000 at this time.' I did not say to him *** that I could not get the money with which to pay it."

There is other evidence in the record touching this question but we think it unnecessary to detail it further. The notes were never paid nor was any part of the indebtedness of plaintiff to the bank paid, except that some time later, the date not appearing, the bank sold the collateral notes and apparently was compelled to buy them, but what it paid for them does not appear.

But defendant contends that he was not in default for the reason that plaintiff did not offer to deliver the $64,500 of notes

to him, and that this was required under the terms of the contract before he could be placed in default. Mr. Forrest testified that on July 1, 1931, the notes were not worth to exceed 40¢ on the dollar, and the evidence all shows that the bank was demanding its money. We think it obvious that a tender of the $64,500 notes by plaintiff to defendant would have been unavailing. The law never requires the doing of a useless act. It is equally clear that if defendant had $64,500 and would take up the notes there would be no difficulty in doing so because the Bank would be anxious to get 100 cents on the dollar upon delivering up such notes and applying that sum on plaintiff's indebtedness to it. This is what the trial Judge expressly found when he decided the case, and we are clear that the finding is supported by the evidence.

Defendant further contends that the judgment for $38,700 is not supported by the declaration nor the evidence; that two special counts set up the contract verbatim and "count specially upon the obligation of the defendant therein contained to pay the plaintiff the sum of $64,500 in cash" plus accrued interest; alleged as a breach that defendant failed and refused to accept the notes or pay the money or any part of it, "pursuant to the terms and provisions of said written agreement;" that the common counts were then added, but no recovery could be had under them because such counts would lie only for the recovery of an indebtedness due and owing, and that the affidavit of plaintiff's claim attached to the declaration was that there was due plaintiff $64,500. And defendant's counsel say that on the trial plaintiff did not attempt to prove what it had alleged but sought to recover damages "for a <u>loss</u> sustained by it by reason of defendant's failure to perform his contract." And furthermore, that the testimony of Mr. Forrest that the notes of the Gas company were not in excess of 40% of their par value should have been excluded because the witness had not

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shown qualifications that would warrant him in giving an opinion. The only evidence of value in the record is the testimony of Mr. Forrest, who was not cross-examined, and Mr. Emerich did not testify on this question. Both Mr. Forrest and Mr. Emerich knew about the Gas company's property in Florida; they had been stockholders in that company and had acted in promoting it. The National Bank of the Republic advanced at least $350,000 and took notes for one-half of this sum from the Gas company and plaintiff took the other half, $175,000. The Bank put up the money and took plaintiff's note secured by the Florida collateral notes. Mr. Forrest testified that he had been in the investment banking business in Chicago since 1908, dealt in almost all classes of investment securities, industrial, municipal or utilities and government bonds. We think this was sufficient to warrant the courtin receiving his opinion as to the value of the notes of the Gas company, and there being no other evidence on this question we think it sufficient to find the notes worth 40% of their face value on July 1, 1931. Moreover, under the terms of the written contract which is the basis of this action, defendant was obligated to take up and pay $64,500 and receive the Gas company's notes, but instead of doing so he is now required to pay only $38,700. We think Osgood v. Skinner, 211 Ill. 229, is in point. In that case it was held that the "Formal tender of shares of stock by the proposed vendor to the proposed vendee is unnecessary to fix the liability of the latter for breach of his contract to buy, where, before the time, he declares his intention not to perform his agreement or refuses to perform it." As the court there said (p. 239): "The difference between the contract price and the market value at the time and place of delivery is a proper measure of damages for a failure to receive personal property, and in very many cases the suits have been brought for such damages."

Defendant further contends that the second and third

counts of the declaration failed to state a cause of action and that the common counts are "inapplicable to the evidence in this case." It is said that the second count is defective in that there is no allegation that plaintiff was capable of and "ready and willing to deliver the notes" as required by the terms of the contract as a condition precedent. No such defense was interposed by defendant in his pleas or affidavit of merits, nor was anything said on the trial to the effect that the evidence was not warranted by the allegations of the declaration. As we have above stated, we think the evidence shows that plaintiff was ready, willing and anxious to deliver the notes. In these circumstances and in view of the fact that the question of plaintiff's ability to deliver was contested on the trial and passed on, defendant cannot be heard to complain. And as was said by our Supreme court in Lyons v. Kanter, 285 Ill. 336: "The issue was introduced by the defendants instead of the plaintiff, but we will not, with the whole record before us, reverse the judgment for the purpose of letting the parties raise in a more formal way an issue of which they have already had the benefit of a full trial." (See also Rubens v. Hill, 213 Ill. 523.) And whether the third count was good or bad it is unnecessary to decide because one good count with supporting evidence is sufficient. Scott v. Parlin & Orendorff Co., 245 Ill.460.

The judgment of the Circuit court of Cook county is affirmed.

JUDGMENT AFFIRMED.

McSurely, P. J., and Matchett, J., concur.

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[illegible]

Respectfully, [illegible]

40061

LENARD REDWINE,
Appellee,

vs.

CHARLES B. HORROCKS and
A. HORROCKS,
Appellants.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

297 I.A. 638

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

By this appeal defendants seek to reverse an order entered by the Circuit court of Cook county October 8, 1937, correcting the record on account of the misprision of the clerk and vacating an order of December 30, 1936, which purported to dismiss the case for want of prosecution.

The record discloses that July 17, 1934, plaintiff filed his complaint to recover damages for personal injuries claimed to have been sustained through the negligence of defendants in failing to keep the stairs, carpets, etc., in an apartment building in a good state of repair, as a result of which plaintiff tripped, was thrown down and sustained personal injuries. The case was noticed and placed on the trial calendar, but on motion of defendants was afterward stricken because it was not then at issue; afterward when the case was put at issue it was again noticed and placed on the "reserve list" and later appeared on the jury trial calendar for the September 1935 term and again on the calendar for the September 1936 term; that about October 10, 1936, the case was called for trial and continued to November 19, 1936, on motion of plaintiff, at which time counsel for both parties answered they were ready for trial. Under the new procedure in the Circuit court it was placed upon the "Reserve List" to be added to the daily trial calendar and when reached assigned to a judge for trial, and was published in the Law Bulletin daily until January 23, 1937, when it was set for trial on February 1, 1937. The case was afterward set for

trial on February 8, 1937, assigned to a judge and tried by a judge and jury. Counsel for both parties participated in the trial. February 11th the jury returned its verdict finding the issues for plaintiff and assessing his damages at $4000. Thereupon defendants entered their motion for a new trial, which was continued to February 19th and on the latter date defendants filed their motion for judgment in their favor notwithstanding the verdict. February 26th the court overruled the motion, entered judgment on the verdict, and defendants' motion for a new trial was continued to March 5th. March 12th defendants filed their petition, setting up what had been done in the case and that on March 5, 1937 they first learned the cause was dismissed December 30, 1936. Defendants prayed that all orders entered after the dismissal be expunged as being null and void. The following day, March 13, 1937, plaintiff filed a petition setting up some of the matters that had occurred as shown by the record, and prayed that the order of December 30, 1936, which purported to dismiss the suit for want of prosecution be expunged from the record. Defendants answered that petition, the court heard the evidence, found that the order of dismissal of December 30th was entered by misprision of the clerk, it was vacated, and defendants appeal.

While the case was pending on the reserve list, or the daily trial calendar, the executive committee apparently ordered a list of cases to be made up by the clerk to be noticed in the Law Bulletin, and December 21, 1936, there appeared a notice in the Bulletin as follows: "Pursuant to the provisions of Section 5 of Rule 22 of the General Rules, the Executive Committee has directed the Clerk of the Circuit court to prepare a calendar of all common law causes pending in this courtin which no action has been taken within one year from the time of their commencement. This calendar will include all cases in which no action has been taken prior to November

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30, 1935, and will be called for trial by Judge Walter J. LaBuy in room 741, Court House, on Wednesday, December 30, 1936, and Thursday December 31, 1936. ****

"If no response is made by either party on this call, cases will be dismissed. If plaintiff fails to appear, case will be dismissed on motion of the defendant, and if defendant fails to appear the court may enter judgment or assign case forthwith to another court for disposition.

"This calendar to be known as the 'No Progress Calendar,' will be published in its entirety in the Law Bulletin on Monday, December 28."

This notice was published in the Law Bulletin for a number of days, and on December 28th another notice appeared in the Bulletin entitled "No Progress Call" which said:

"The following is a list of common law cases pending in the Circuit Court, in which no action has been taken within one year from the time of their commencement and includes all cases in which no action has been taken prior to November 30, 1935. This calendar will be called by Judge LaBuy" on December 30 and December 31, and if no response is made the cases will be dismissed. Then follows a list to be called December 30th, which included the instant case. December 30th an order was entered dismissing the case "without costs for want of prosecution." Neither party learned of the dismissal until March 5, 1937, when defendants' counsel discovered the order. January 26, 1937, an order was entered resetting the cause for trial, both parties being in court at the time. Afterward the case was tried as stated.

The position of counsel for defendants seems to be that pursuant to the provisions of Sec. 5 of Rule 22 of the Rules of the Circuit court of Cook county, the executive committee ordered certain cases pending, including the instant case, to be put on the "No

30, 1935, and will be called for trial by [illegible] . [illegible]ay in room 741, court house, [illegible], December [illegible], [illegible] [illegible]ay December 31, 1935. [illegible]

"If no res[illegible] is [illegible] [illegible] [illegible], cases will be dismissed. If plaintiff fails to appear, cases will be dismissed on motion of [illegible], [illegible] [illegible] [illegible] a year the court may [illegible] or [illegible] [illegible] [illegible] to another court for disposition.

"This calendar is to be [illegible] [illegible] [illegible] will be published in the [illegible] [illegible] [illegible], December 28."

This notice was [illegible] [illegible] [illegible] for a number of days, and on December [illegible] [illegible] appeared in the bulletin entitled "No [illegible] [illegible]":

"The following [illegible] [illegible] [illegible] [illegible] in the Circuit Court, in which no action has been taken within one year from the time of their commencement and including all cases in which no action has been taken prior to [illegible] 30, 1933. This calendar will be called by Judge [illegible] on December 31, and if no response is made the case will be dismissed. There follows a list to be called Dec[illegible] 30, which included the instant case.

December 30th, [illegible] [illegible] [illegible] the case "without costs for want of prosecution." [illegible] [illegible] of the dismissal until March 9, 1937, when [illegible] [illegible] discovered the order. January 26, [illegible] [illegible] reopening the case for trial, [illegible] [illegible] [illegible] [illegible]. Afterward the case was tried as [illegible].

The position of [illegible] is [illegible] to be that pursuant to the provisions [illegible] Code 29 of the Laws of the Circuit court of [illegible] county, the [illegible] committee ordered certain cases pending, including the instant case, to be put on the "No

Progress Calendar," and to be dismissed in case plaintiff did not appear. This is apparently what the court intended to do but is not what the court did. Sec. 5 of Rule 22 provides:

"From time to time the Executive Committee shall cause the Clerk of the Court to prepare separate law and chancery calendars of all cases in which no action has been taken within one year and assign such calendars to one or more judges for disposition. When called on any such calendar, the cases listed thereon shall be called for trial. If the plaintiff is not ready for trial, the cause, except as hereinafter stated, shall be dismissed for want of prosecution," etc. But the order and notice that appeared in the Law Bulletin was not in accordance with the provisions of this rule. The rule provided for the dismissal of cases in which no action had been taken for one year, but the order and notice in the Bulletin did not follow the rule. The clerk was directed to make up a calendar of cases in which no action had been taken within one year from their commencement. The instant case was commenced July 17, 1934, and an order was entered April 12 and another April 19, 1935, which was within a year from the time the action was commenced. Under the order entered as published in the Bulletin the instant case should not have been included; but we think it clear that the clerk made a mistake in writing up the order and publishing the notice, so that the case was erroneously put on the "No Progress Calendar." He should have followed the provision of section 5 of the rule we have just quoted. Moreover, we think it clear that even if the rule of court were followed, the case was erroneously put on the "No Progress" calendar because it was then pending on the trial calendar. It was clearly a misprision of the clerk and the court was warranted in correcting the error.

Furthermore, we think all we have said and all of the

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contentions made in the briefs are of no importance even if we assume that the case was properly dismissed December 30, 1936, for the reason that within 30 days thereafter, viz., January 26th, an order was entered resetting the case for trial, and for the further and controlling reason that the parties went to trial and tried the case on its merits without any objection. In these circumstances both parties would be estopped to say that the court was without justiedjiction to hear the cause because the case had been dismissed more than 30 days prior to the trial, although neither party had any notice of the dismissal until long afterward. Zandstra v. Zandstra, 226 Ill. App. 293; Herrington v. McCollum, 73 Ill. 476.

In the Zandstra case we said (p. 306): "In the Herrington case (73 Ill. 476) the bill was dismissed in 1863. The cause was reinstated in 1865 without notice, and it was contended that the court had no jurisdiction to reinstate the case. The record there showed that after the case was reinstated orders were entered at the request of each of the parties and the case was tried. The court there said (p. 479): 'The court, unquestionably, had jurisdiction of the subject-matter of litigation; and it has never been questioned that parties may so far control jurisdiction over their own persons, in such a case, as to confer upon the court the right to proceed, by voluntarily entering an appearance.'"

The case having been tried on its merits by both parties, the court had jurisdiction of them and of the subject matter. There was a verdict and judgment in plaintiff's favor. No appeal has been prosecuted from that judgment and it would avail defendants nothing even if it be held that the order appealed from was a nullity. We have heretofore held that the order was proper, and it is affirmed.

ORDER AFFIRMED.

McSurely, P. J., and Matchett, J., concur.

40173

JOHN P. BAUER,
Appellee,

vs.

NELLIE J. PARKER,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

297 I.A. 639

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

May 13, 1937, plaintiff caused judgment by confession to be entered against defendant for $56,432.19. Defendant's motion to open the judgment and for leave to defend was denied and she appeals. The basis of the action was a promissory note dated June 26, 1926, for $50,000 made by defendant, Nellie J. Parker, alias Helen L. Jones, due on or before one year after date. The note bore an endorsement whereby payment of the note was guaranteed by Mrs. Parker's husband, Francis J. Parker. August 12, 1937, an order was entered giving defendant leave to file a petition praying that the judgment be opened and for leave to defend. On the same day defendant's verified petition was filed. August 25, 1937, an order was entered giving plaintiff leave to file counter affidavits within five days. August 30 plaintiff filed four affidavits. January 5, 1938, defendant filed two affidavits in support of her petition and on January 8 an order was entered giving plaintiff leave to file an additional counter affidavit, which was accordingly done. January 10 an order was entered giving defendant leave to file counter affidavits within 10 days, and January 20 defendant filed the affidavits of eight different persons. January 26 an order was entered giving plaintiff leave to file his affidavits instanter and the affidavits of two persons were filed at that time. January 29 an order was entered which recites the coming on of plaintiff's motion "to strike the defendant's petition and affidavits as not setting forth a meritorious defense to vacate the judgment heretofore

entered herein by confession. After argument of counsel and due deliberation by the court said motion is sustained to which the defendant excepts." The court fixed defendant's bond at $25,000. It is from this order that defendant appeals. The payment of the $50,000 evidenced by the note in suit was secured by a trust deed on Chicago real estate.

Defendant contends that after the execution of the note and trust deed by her, she sold the property and the grantee assumed and agreed to pay the encumbrance; that afterward a valid and binding agreement was entered into between the mortgagee and the then owner of the property, extending the time of payment of $40,000 ($10,000 having been paid) without defendant's knowledge or consent, and that this released her. Defendant further contends she was also released by reason of the fact that in 1933 a brewing company was incorporated to operate a brewery in the building on the premises and about that time Edward R. Litsinger, who defendant contends is the beneficial plaintiff and who had an interest in the brewery, entered into an agreement with her whereby she agreed to sell to him a controlling interest in the brewery for a certain consideration, part of which was that he would release her and her husband from the remaining liability of $40,000 on the note and would look solely to the brewery company for such payment. This was a few years after defendant claims the time of payment of the indebtedness had been extended by her grantee and the owner of the indebtedness without her knowledge or consent. The extension, defendant contends, was made in May, 1928, by her grantee, C. C. Gardner, who paid $10,000 on account of the indebtedness at that time without her knowledge or consent.

The record further tends to show that payment was extended on three other occasions, the debt becoming due as last extended in December, 1930.

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Defendant in her petition filed August 12, 1927, whereby she sought to have the judgment opened up and for leave to defend, swore that at the maturity of the note "without the knowledge or consent of her husband she entered into an agreement with the Southwest Trust and Savings Bank, the owner and holder of said note, to extend the time of payment thereof for a period of five years." After the filing of the petition defendant sets up in affidavits that the above quotation was made by her through a misapprehension and that the facts were later brought to her attention in affidavits filed on behalf of plaintiff, viz., that the extension agreement was made by her grantee, Gardner.

Substantially all the allegations made in the affidavits filed on behalf of defendant to the effect that the time of payment was extended without her knowledge or consent are specifically denied in the affidavits filed on behalf of plaintiff.

It is not proper to consider counter affidavits controverting the defence which goes to the merits, since defendant has a right to submit that issue to a jury. Gilchrist Transportation Co. v. Northern Grain Co., 204 Ill., 510; Elaborated Ready Roofing Co. v. Hunter, 262 Ill. App. 380, and cases there cited. Counsel for plaintiff agree with this contention but say that the trial court, in deciding the case, did not consider plaintiff's counter affidavits, it appearing from the order appealed from that the court sustained plaintiff's motion to strike defendant's petition and affidavits because they did not set forth a meritorious defense. The record is somewhat confused. It contains a report of the proceedings in which two witnesses were cross-examined by plaintiff's counsel under Section 60 of the Civil Practice act. It also contains all the affidavits and counter affidavits. It states that defendant offered and there were received in evidence her petition and affidavits. Following this appear defendant's petition and affidavits, at the conclusion of

Defendant in her petition filed August 11, 1927, merely sought to have the judgment vacated on her motion to defend, swore that at the maturity of the note "without her knowledge or consent of her husband she entered into an agreement with the Southwest Trust and Savings Bank, the owner and holder of said note, to extend the time of payment thereof for a period of one year." After the filing of the petition defendant sought to affirmatively show the above quotation was made in a conversation in which the facts were later brought to her attention in affidavits filed on behalf of plaintiff, viz., that an extension agreement was made by her grantee, another.

Substantially all the allegations made in the affidavits filed on behalf of defendant to the effect that the time of payment was extended without her knowledge or consent are specifically denied in the affidavits filed on behalf of plaintiff.

It is not proper to consider court's affidavits controverting the defense which goes to the merits, since defendant has a right to submit that issue to a jury. Wildhardt Transportation Co. v. Northern Grain Co., 204 Ill., 210; Kingsbury Heat. & Ltg. Co. v. Hunter, 262 Ill. 420, 430, and cases therein cited. Counsel for plaintiff agree with this contention but say that the trial court, in deciding the case, did not consider plaintiff's counter affidavits, it appearing from the order appealed from that the court considered plaintiff's motion to strike her further motion and affidavits because they did not set forth a meritorious defense. The record is somewhat confused. It contains a report of the proceedings in which two witnesses were cross-examined by plaintiff's counsel under section 60 of the Civil Practice Act. It also contains all the affidavits and counter affidavits. It states that defendant offered and there were received in evidence her motion and affidavits, following this appear defendant's petition and affidavits, at the conclusion of

which the report of the proceedings recites that plaintiff then offered in evidence his affidavits and they are then set forth in full. At the conclusion of these the report states that this was all the evidence offered or received by either party or considered by the court at the trial, and that thereupon plaintiff moved to strike the petition and affidavits of defendant because they did not set forth a meritorious defense; that the court sustained the motion, struck the petition and affidavits, to which defendant excepted; thereuppn the court denied defendant's motion to open up the judgment; that the defendant then excepted and defendant's bond was fixed at $25,000.

We think it is shown from this that the court considered the petition and all affidavits filed. The matter set up in the affidavits is very much involved, but we think sufficient appears from defendant's affidavits alone to require opening the judgment and giving her leave to defend.

If the time of payment of the note was extended without defendant's knowledge or consent, she would be released. Albee v. Gross, 250 Ill. App. 98; Douglass v. Ullsperger, 251 Ill. App. 145; Farmers & Merchants Bank v. Marvid, 259 Ill. App. 554; Tabero v. Sutkowski, 286 Ill. App. 225; Kazunas v. Wright, 286 Ill.App. 554; Prudential Ins. Co. v. Bass, 357 Ill. 72. We are also of opinion that if a part of the consideration for the sale of the brewery stock by Mrs. Parker to Mr. Litsinger was (as is contended by her) that he would release her and her husband from all obligation on the note, looking solely to the brewery company for payment, this would be a good defense although at the time such an agreement was entered into Litsinger did not own the note and trust deed and could not speak for the bank or its receiver. He was vice-president of the bank at the time and attorney for the Parkers, and a part of the consideration he was to pay for the brewery stock was his

which the report [illegible] plaintiff then
offered in evidence [illegible] been set forth
in full. At the [illegible] stated that all
was all the evidence [illegible] g r [illegible] sustai-
ered by the court [illegible] moved
to strike the petition [illegible] counsel
did not [illegible]
the motion, [illegible] defendant
excepted; [illegible]
up the judgment; [illegible]
bond was fixed at [illegible].

We think [illegible] the petition and all [illegible] affidavits is very [illegible] from defendant's [illegible] and giving her leave [illegible].

[illegible] defendant's [illegible] v. Grose, 85 [illegible]; [illegible] 145; Pierce [illegible] v. Sutkewski, [illegible]; [illegible] 584; [illegible] opinion that it a part [illegible] brewery stock [illegible] by her) that [illegible] on the note, [illegible] this would be [illegible] was entered [illegible] could not open [illegible] of the bank [illegible] of the corporation [illegible] the brewery stock was sig

agreement to release the Parkers on the note. And there are some matters in the record tending to show that Mr. Litsinger was the beneficial owner of the note at and prior to the time the judgment was confessed. Whether Litsinger at the time owned or controlled the note and trust deed would not necessarily be decisive.

Counsel for defendant further contend that "where the fee to lands and a mortgage were in the same person, the mortgage and the documents merged in the fee." We find no application of this point to the case at bar. The question is not before us. Some point seems to be made by defendant questioning the right of plaintiff, Bauer, to maintain this suit for the reason, it is said, that the note in suit belongs to Litsinger. If we assume this to be the fact it avails defendant nothing. Kazunas v. Wright, 286 Ill. App. 554. We there said: "We hold that under the law plaintiff can maintain this suit although the beneficial ownership of the notes is in another person. This is settled by the provisions of the Negotiable Instruments Act. *** Par. 71; and by repeated decisions of the Appellate and Supreme Courts."

Plaintiff further contends that the judgment is right and should be affirmed because the petition and affidavits filed by defendant did not comply with Rule 26 of the Supreme court. That rule provides in part: "A motion to open a judgment by confession shall be supported by affidavit in the manner provided by rule 15 for summary judgments, and if the motion and affidavit disclose a prima facie defense on the merits to the whole or a part of the plaintiff's demand, the court shall set such motion down for hearing." And Rule 15 provides: "The affidavit in support of a motion for summary judgment shall be made on the personal knowledge of the affiants; shall set forth with particularity the facts upon which the plaintiff's cause of action is based; shall have attached thereto sworn or certified copies of all papers upon which plaintiff relies;

agreement to release the [illegible] the note. [illegible] there are some matters in the record [illegible] to show that [illegible] was the beneficial owner [illegible] the judgment was contested. [illegible] or controlled the note and trial [illegible] deceive.

Counsel for [illegible] contend that "we are the [illegible] to lands and a [illegible] the [illegible] the documents [illegible] point to the [illegible] point seems to be [illegible] plaintiff, [illegible] that the note is [illegible] be the fact it [illegible] III. App. 534. [illegible] tiff can maintain [illegible] the note is [illegible] of the Negotiable Instruments [illegible] decisions of the [illegible]."

Plaintiff [illegible] should be affirmed [illegible] fendant did not [illegible] rule provides in part: "A motion [illegible] shall be announced [illegible] for summary [illegible] prima facie [illegible] plaintiff's [illegible]." And rule 19 provides: "[illegible] motion for summary judgment shall be made on the personal knowledge of the affiants; shall set forth [illegible] the plaintiff's cause of action is based; shall [illegible] sworn or certified copies of all papers upon [illegible] plaintiff relies;

shall not consist of conclusions but of such facts as would be admissible in evidence; and shall affirmatively show that the affiant if sworn as a witness, can testify competently thereto.***

"Affidavits of merits to prevent the entry of a summary judgment shall be drawn in the same manner as the affidavits mentioned in the foregoing paragraph of this rule."

And counsel say that no documents were attached to defendant's petition nor any of the affidavits and that this was necessary under the rules. They say it is obvious that defendant was relying upon the trust deed securing the note, the deed from defendant to C. C. Gardner conveying the premises, and the alleged extension agreement between Gardner and the holder of the mortgage note. If we assume counsels' interpretation of the rules to be correct, this would require an affirmance of the order or judgment appealed from for the reason that the extension agreement and many of the other matters upon which defendant relies were conceded by the counter affidavit filed by plaintiff. In these circumstances we think plaintiff is not in a position to complain on this ground.

Counsel further say that the affidavit of Gardner filed by defendant is a nullity because it purports to have been sworn to before Frank G. Reid, Commissioner of the Superior Court District of Montreal. Section 6, chap. 101 of our Statute provides: "When any oath authorized or required by law to be made is made out of the state, it may be administered by any officer authorized by the laws of the state in which it is so administered, and if such officer have a seal, his certificate under his official seal shall be received as prima facie evidence without further proof of his authority to administer oaths." And it is said the certificate is insufficient because it was not under the official seal of the officer administering the oath and because it does not indicate that his authority "is derived from the laws of the State from which the oath

shall not cause [illegible] to be ad-
missible in evidence; [illegible] difficult
if ever to be a [illegible] *

"Authorities [illegible] judgment shall be [illegible] authorities mentioned in the [illegible]."

[illegible] ant's petition for [illegible] under the [illegible] upon the [illegible] O. G. Gardner [illegible] agreement between [illegible] we assume some [illegible] would [illegible] for the [illegible] matters [illegible] affidavit [illegible] plaintiff is not [illegible]

[illegible] by defendant [illegible] to before [illegible] of Montreal. [illegible] any oath [illegible] state, it may [illegible] of the [illegible] have a [illegible] ceived [illegible] to admission [illegible] cient [illegible] minister [illegible] thority "is [illegible] oath

is administered." The certificate is as follows: "Subscribed and sworn to before me this 17 day of January, A. D. 1938 and I certify that I am authorized by law to administer oaths. Frank G. Reid, Commissioner of the Superior Court District of Montreal." We think this certificate is sufficient. Ferris v. Comm. Nat. Bank, 158 Ill., 237. In that case the purported affidavits taken in Canada were held void because, as there stated, "The notaries public before whom the papers were sworn to gave no certificates of their authority to administer oaths in the Dominion of Canada. Rev. Stats., chap. 101, sec. 6; Smith v. Lyons, 80 Ill. 600." In the instant case the notary certifies that he is authorized by law to administer oaths. This is sufficient.

Plaintiff further contends that, "This appeal was not taken from a final order of the trial court, and this court consequently is without jurisdiction to do otherwise than dismiss the appeal," and it is said the order appealed from sustained plaintiff's motion to strike defendant's petition and affidavits as not setting forth a meritorious defense, and is not a final order. We think this contention cannot be sustained. It is obvious from what we have heretofore set forth that the court disposed finally of the matter in controversy.

The judgment of the Superior court of Cook county is reversed and the cause remanded for further proceedings in accordance with the views herein expressed.

REVERSED AND REMANDED.

McSurely, P. J., and Matchett, J., concur.

is adumbrated. [illegible]

sworn to before [illegible]

that I am [illegible]

Commissioner [illegible]

think this cause [illegible]

138 III., [illegible]

Canada w[illegible]

before w[illegible]

authority to [illegible]

State, [illegible]

instant case [illegible]

to admit [illegible]

[illegible]

from a [illegible]

is without [illegible]

and it is [illegible]

to strike [illegible]

a meritorious [illegible]

contention [illegible]

heretofore [illegible]

in controversy.

[illegible]

vorced [illegible]

with the view [illegible]

[illegible]

Moderely, [illegible]

40174

JOHN P. BAUER,
Appellee,

vs.

FRANCIS J. PARKER,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

297 I.A. 639

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

We have this day filed an opinion in case No. 40173, John P. Bauer v. Nellie J. Parker, in which the facts are the same as in the instant case, except that the judgment here was entered by confession in another action against Francis J. Parker on his written guarantee of the note in the suit brought against his wife, Nellie J. Parker. Defendant's motion to open the judgment and for leave to defend was denied and this appeal follows.

The guarantee on the back of the note, which was signed by Francis J. Parker at the time the note was executed, is as follows: "For value Received the undersigned hereby guarantee__ the prompt payment of within note at within or any extended maturity thereof, and agree__ to be bound by all the terms and provisions thereof hereby waiving demand, protest and notice of protest, and in case of any default in payment thereof, hereby authorize any attorney to appear and confess judgment in any court of record against the undersigned jointly with the maker or makers of said note, or otherwise for any amount which may be due thereon, together with costs and reasonable attorney's fees."

In the case against Mrs. Parker, No. 40173, we held that a sufficient meritorious defense was shown to require the court to open the judgment, the judgment to stand as security, and to permit Mrs. Parker to defend.

Counsel for plaintiff contend that by the terms of the guarantee Francis Parker guaranteed payment of the note at maturity "or any extended maturity thereof," and therefore the several ex-

40174

JOHN P. [illegible],

vs.

FRANCIS J. [illegible],

[illegible]

29 [illegible] 639

MR. JUSTICE [illegible]

We have [illegible]

P. Bauer v. Nellie [illegible]

in the instant case, [illegible]

confession in another action [illegible]

written guarantee of [illegible]

wife, Nellie [illegible]

and for leave to [illegible]

The [illegible]

Francis J. Barker [illegible]

"For value received [illegible]

payment of which [illegible]

and agree [illegible]

hereby waive [illegible]

of any default in [illegible]

to appear and confess [illegible]

undersigned jointly [illegible]

wise for any amount [illegible]

and reasonable [illegible]."

In the [illegible]

sufficient [illegible]

open the [illegible]

Mrs. Barker [illegible]

[illegible]

guarantee [illegible]

"or any external [illegible] the several ex-

tensions were authorized by him and he is not released. In support of this they cite Continental National Bank & Trust Co. v. Reynolds, 286 Ill. App., 290, and Kent v. Rhomberg, 288 Ill.App. 328. The Reynolds case was a foreclosure suit. The note provided that if there was any agreement made by the legal holder extending the time of payment, the liability of the maker would continue "with or without notice" of such extension. And the trust deed provided that the mortgagors would pay the indebtedness according to the terms of the note "or according to any agreement extending the time of payment thereof." There were several extensions of the time of payment without the knowledge or consent of the mortgagors, but it was held that they were not released because of the provision in the note and the one in the trust deed.

In the Kent case a judgment was confessed on the note, payment of which was secured by a trust deed in which there was a provision that the mortgagor agreed "to pay said indebtedness according to any agreement extending the time of payment." And it was held that the mortgagor was not discharged although the time of payment hadbeen extended without his consent. But since we have reached the conclusion in Mrs. Parker's case that she made a prima facie showing that Mr. Litsinger had agreed to release her and her husband in connection with the sale of the brewery stock, we think this would release Parker as well as his wife, for the reasons stated in our opinion in Mrs. Parker's case. And since there must be a trial of the case we might point out that the warrant of attorney executed by Francis J. Parker authorized the confession of judgment against him "jointly with the maker" of the note and "against him alone."

To the point made by defendant that he was released by virtue of the provisions of Par. 5, Sec. 119 of our Negotiable Instrument act (Ill. Rev. Stats. 1937, par. 141, chap. 98, sec.119)

[illegible]

tenalone were [illegible]

port of this [illegible]

Reynolds, 236 Ill. [illegible] 328. [illegible]

vided that [illegible]

extending the [illegible]

continue [illegible]

trust deed provided [illegible]

according [illegible]

extending, the [illegible]

tenalone of the [illegible]

of the mortgagee, [illegible]

because of the provision [illegible]

In the *Lake* case [illegible]

payment of which was [illegible]

provision that [illegible]

cording to any [illegible]

held that the [illegible]

payment Rubber [illegible]

received the [illegible]

Prairie Trust and [illegible]

and her husband [illegible]

we think this [illegible]

reasons [illegible]

there must be [illegible]

rest of [illegible]

tension of [illegible]

note and [illegible]

[illegible]

virtue of the [illegible]

Instrument [illegible] (Ill. [illegible] 20)

which provides that one secondarily liable is discharged from a binding agreement to extend the time of payment, we say that under the provisions of that paragraph Parker would be released of liability by reason of the extension of time of payment of the indebtedness made by the grantee with the owner of the indebtedness without Mrs. Parker's knowledge or consent, except for the fact that Parker had guaranteed the prompt payment of the note at maturity or "any extended maturity thereof."

Parker being a guarantor was secondarily liable. Vermont Marble Co. v. Bayne, 356 Ill., 127; Sec. 191 Negotiable Instrument Act. In the Bayne case the court said (p. 136): "There is a substantial distinction between the liability of a surety and that of a guarantor. A surety's undertaking is an original one, by which he becomes primarily liable with the principal debtor, while a guarantor is not a party to the principal obligation and bears only a secondary liability. The surety's agreement is that he will do what his principal has agreed to do, whereas the undertaking of the guarantor is that the principal will do what he has agreed to do. The surety becomes primarily and directly liable on his contract from the beginning and is bound with the principal upon the same contract, while the guarantor ordinarily becomes liable for the performance of a prior or collateral contract upon which the principal, alone, is obligated." What we have above said as to the terms of the guarantee is applicable to this contention.

The judgment of the Superior court of Cook county is reversed and the cause remanded with directions to the trial court to open up the judgment, the judgment to stand as security, and permit defendant to defend on the merits.

REVERSED AND REMANDED WITH DIRECTIONS.

McSurely, P. J., and Matchett, J., concur.

while [illegible]

binding agreement [illegible]

the provisions of [illegible]

bility by reason of [illegible]

ednesss made by the [illegible]

out Mrs. Parker's [illegible]

Parker had [illegible]

or "any extended [illegible]

Parker [illegible]

Marble Co. v. Ramos, [illegible] Act. In the [illegible]

substantial distribution [illegible]

of a process [illegible]

he becomes [illegible]

guarantor is [illegible]

a secondary liability. [illegible]

what his [illegible]

guarantor [illegible]

The surety been [illegible]

from the [illegible]

contract, [illegible]

performance [illegible]

pal alone, [illegible]

of the [illegible]

[illegible]

and the [illegible]

the judgment, [illegible]

to defraud [illegible]

[illegible]

Mooney, [illegible]

39693

CITY NATIONAL BANK & TRUST COMPANY,
a corporation, as trustee, and
CENTRAL REPUBLIC TRUST COMPANY,
a corporation, as trustee,
Appellants,

v.

WALTER S. ROSS,
Appellee.

CONSOLIDATED APPEAL
FROM SUPERIOR COURT,
COOK COUNTY.

297 I.A. 639

MR. PRESIDING JUSTICE FRIEND
DELIVERED THE OPINION OF THE COURT.

In this case plaintiffs brought suit against Walter S. Ross upon an instrument of guaranty made by defendant, together with certain other individuals, three of whom are appellees in cases Nos. 39691, 39692 and 39694. The four cases were consolidated on appeal, and an opinion has this day been filed in case No. 39691. The reasons set forth and conclusions reached in that case are controlling in this proceeding, and therefore the judgment of the Superior court, entered herein, is reversed and the cause is remanded with directions to enter judgment in favor of plaintiffs and against defendant for the amount sued for, plus attorneys' fees, as provided in the instrument of guaranty, proof of which was expressly postponed until final determination of the case.

JUDGMENT REVERSED AND CAUSE REMANDED
WITH DIRECTIONS.

Sullivan and Burke, JJ., concur.

39694

CITY NATIONAL BANK & TRUST COMPANY,
a corporation, as trustee, and
CENTRAL REPUBLIC TRUST COMPANY,
a corporation, as trustee,
Appellants,

v.

DANIEL H. BURNHAM,
Appellee.

CONSOLIDATED APPEAL
FROM SUPERIOR COURT,
COOK COUNTY.

297 I.A. 639

MR. PRESIDING JUSTICE FRIEND
DELIVERED THE OPINION OF THE COURT.

In this case plaintiffs brought suit against Daniel H. Burnham upon an instrument of guaranty made by defendant, together with certain other individuals, three of whom are appellees in cases Nos. 39691, 39692 and 39693. The four cases were consolidated on appeal, and an opinion has this day been filed in case No. 39691. The reasons set forth and conclusions reached in that case are controlling in this proceeding, and therefore the judgment of the Superior court, entered herein, is reversed and the cause is remanded with directions to enter judgment in favor of plaintiffs and against defendant for the amount sued for, plus attorneys' fees, as provided in the instrument of guaranty, proof of which was expressly postponed until final determination of the case.

JUDGMENT REVERSED AND REMANDED
WITH DIRECTIONS.

Sullivan and Burke, JJ., concur.

CITY MATCHES [illegible]
a corporation, [illegible]
CHEMICAL [illegible]
a corporation, [illegible]

[illegible]

DAVID H. H. [illegible]

[illegible]

II. Burning upon [illegible]
together with [illegible]
appellee in error [illegible]
cause were [illegible]
been filed in [illegible]
conclusions [illegible]
coming, and [illegible]
entered herein. [illegible]
directions [illegible]
defendant [illegible]
provided in [illegible]
expressly [illegible]

[illegible]

39953

HARRY HEALY,
Appellant,

v.

UTILITY SUPPLY COMPANY,
a corporation,
Appellee.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

297 I.A. 640

MR. PRESIDING JUSTICE FRIEND
DELIVERED THE OPINION OF THE COURT.

Harry Healy, plaintiff, brought suit against defendant for damages resulting from a collision with a motor truck operated by defendant's agent. The cause was tried by the court and a jury, resulting in a verdict and judgment finding the defendant not guilty. The court overruled plaintiff's motions for judgment notwithstanding the verdict and for a new trial, and this appeal followed.

It appears from the evidence that plaintiff, 52 years of age, resided at the Astor hotel located on the west side of Clark street, just south of Lake street in the City of Chicago. August 1, 1936, at about 9:30 a.m., he left his hotel and walked north on Clark street to the intersection of Lake street, where he turned east on the south side of Lake street at the cross walk and was either struck by or walked into defendant's truck, which had proceeded west on Lake street and turned south at the intersection into Clark street.

Aside from the contention that the court erred in charging the jury, the only error relied upon by plaintiff is that the verdict was against the manifest weight of the evidence. Defendant's counsel complains that plaintiff has failed to fully abstract the

39963

HENRY M. [illegible],
Ap. [illegible],

v.

UTILITY [illegible] M.,
a corporation,
Appellee.

[illegible]

[illegible]

Henry M. [illegible], [illegible]
for damage [illegible]
by defendant's [illegible]
resulting in a [illegible]
nuity. The [illegible]
whether [illegible]
followed.

It [illegible]
age, resided [illegible]
street, in [illegible]
1, 1966, [illegible]
on Clark street [illegible]
east on the [illegible]
either [illegible]
west on [illegible]
street.

Aside from the [illegible] in making
the jury, the [illegible] upon [illegible] the jury rules
was against the [illegible] of the evidence. Defendant
counsel complains [illegible] allowed fully examined the

evidence, and that in his argument he fails to quote some of the essential testimony of the principal witnesses. However, from a careful examination of the record we find the following salient facts: When defendant's truck, proceeding west on Lake street, came to Clark street, the traffic control lights were red and Korer, the driver, brought the truck to a stop and waited until the light changed to green before starting to make the left turn south on Clark street. His testimony on this point is corroborated by Timothy J. Blumenthal, the helper on the truck, who sat beside Korer. When the lights changed to green, Korer proceeded to make a left turn, and he testified that as he did so he was looking straight in front of him and had a complete view all around the front of the truck and could also see part of the side of the truck, namely, the right and left front fenders, and he stated positively that the front of the truck did not come in contact with anybody and that no person came in contact with the front part of his truck. The road was clear and he saw no pedestrians crossing anywhere on the pavement on the south cross walk of Lake street as he made the turn. When he turned into Clark street and his truck was in the south bound car tracks on the west side of the street, and he had already passed the south cross walk by a little more than a truck length, he heard a bump or thud on the right side of the truck, toward the rear. According to his testimony and that of his helper he was then going between 10 and 12 miles an hour, and he immediately put on the brakes and came to a stop within 20 feet after he heard the thud. As the truck turned into Clark street the noise in the rear attracted his attention, and he asked, "What's that?", and Blumenthal, his helper, replied, "Something must have hit us." The truck had a panel body, and the thud was easily heard. Korer and Blumenthal both got out of the truck at once, to find out what had happened,

evidence, and [illegible] essential to [illegible] careful [illegible] facts: [illegible] came to [illegible] Korer, the driver [illegible] the light changed [illegible] south on Ninth Street. [illegible] by Timothy J. Lamenski, the [illegible] Korer. When the light [illegible] left turn, and he [illegible] in front of him and [illegible] truck and could [illegible] right and left from [illegible] front of the [illegible] person came in contact [illegible] was clear and he [illegible] ment on the south side [illegible] then he turned into [illegible] bound car making an [illegible] passed the [illegible] he heard a bump [illegible] rear. According [illegible] then joining [illegible] on the [illegible] thud. [illegible] attracted [illegible] his helper, [illegible] a panel body, [illegible] both of the [illegible]

and they saw plaintiff on his feet, being led toward the curb with the arm of another person around him. Both witnesses noticed that plaintiff still had his glasses on. Korer wanted to ask plaintiff what happened, but a man bending over and talking to plaintiff, refused to allow Korer to speak to him and he therefore waited until an officer arrived. The testimony of both defendant's witnesses clearly indicates that as the turn was made the driver kept his eyes on the road, and both witnesses said that they did not see any pedestrians close to the sidewalk, to the curb or in the path of their truck. The substance of Korer's testimony may be summarized by the following excerpts taken from the abstract: "I did not see the plaintiff or injured man at any time before I got out of the truck. When I made the left turn I did not notice, or see, any pedestrians crossing on the pavement or on the sidewalk. The road was clear. When I stopped the truck I was still in the car tracks. *** When I made the left turn I was looking straight in front of me. I had a complete view all around the front of the truck. The front of the truck did not come in contact with anybody, I could also see out of the side, the right and left fenders. I did not see any person come in contact with that part of the car as I made the turn. I did not see anyone at all. Either before or after the turn I did not see anyone. Neither the front of the truck nor the right front fender came in contact with anybody."

Plaintiff, testifying in his own behalf, said that when he arrived at the corner of Clark and Lake streets he waited on the southwest corner of the street for the signal light, before crossing toward the east; that when the green light flashed on he made one step off the curb and saw a truck, about 70 or 80 feet in the distance approaching from the east on Lake street and coming west; that he looked to the left and started to cross, then looked to the right, and as he again looked to the left he was hit with

and they saw plaintiff on his feet, a block and a half away with the arm of another person in front him. Both witnesses noticed that plaintiff still had his glasses on. Never asked to ask plaintiff what happened, but saw him bending over and talking to plaintiff, returned to allow Horst to speak to him and he therefore waited until an officer arrived. The testimony of both witnesses corresponds clearly indicates that at the time the driver kept his eyes on the road, and both witnesses said that they did not see any pedestrians close to the sidewalk, in the curb or in the path of their truck. The substance of Mr. [illegible] testimony may be summarized by the following excerpts taken from the statements: "I did not see the plaintiff or injured man at any time before I [illegible] one of the trucks. When I made the left turn I did not notice, or see, any pedestrians crossing on the pavement or on the sidewalk. The [illegible] close. When I stopped the truck I was still in the cross walks. [illegible] then I made the left turn [illegible] looking straight in front of me. I had a complete view all around the front of the truck. The front of the truck did not come in contact with anybody. I could also see one of the side, the right and left fenders. I did not see any person come in contact with that part of the car as I made the turn. I did not see anyone at all. Either before or after the turn I did not see anyone. Neither the front of the truck nor the right front fender came in contact with anybody."

Plaintiff, testifying in his own behalf, said that when he arrived at the corner of [illegible] and [illegible] he waited on the southwest corner of the street for the signal light, before crossing toward the east, that when the green light flashed on he made one step off the curb onto the [illegible] about 20 or 30 feet in the distance at approaching from the east on the [illegible] street and coming west; that he looked to the left and to the right, then looked to the right, and then he again looked to the left he was hit with

the front end.

In addition to his own testimony, one other witness, Thomas F. Campbell, testified on behalf of plaintiff. He was crossing Clark street at approximately the same time and in the same place as plaintiff, and he said that the first he saw of the truck was when it was making a turn into Clark street and crossing the Lake street car tracks to make the turn; that he was still on the curb, and the truck was facing southwest and coming around the corner at a rapid rate of speed; that he did not see the actual impact of the truck hitting plaintiff, but first observed plaintiff when he was lying down at the side of the truck; that after the truck made the turn it straightened itself out, continued south about 150 feet and came to a stop only after Campbell had called to the driver.

Aside from the plaintiff, Campbell, Korer and Blumenthal, there were no other occurrence witnesses. Defendant's counsel points out various discrepancies in plaintiff's testimony and that of Campbell, but these are directed only to the credibility of the witnesses and it was within the province of the jury to pass upon them. No one contends that either plaintiff or defendant's driver were crossing in violation of the traffic signal. Although Campbell said that defendant's truck made a left turn into Clark street at a high rate of speed, both Korer and Blumenthal said positively that they were not going faster than 10 or 12 miles an hour, and brought their truck to a stop within 20 feet after they had heard the thud. Both Korer and Blumenthal said positively that they did not see plaintiff at any time before they got out of the truck, and that no pedestrians were crossing the street in their path at the time. Korer's testimony that he was looking straight in front of him, that he had a complete view all around the front of the truck, and that he did not see any

the front end.

In addition to [illegible] testimony, [illegible] Thomas K. Campbell, testified on behalf of [illegible], crossing Clark street [illegible] the same place as plaintiff, [illegible] the truck was when it was making [illegible] the Lake street car [illegible] the curb, and the truck [illegible] corner at a rapid rate of speed [illegible] impact of the [illegible] when he was lying [illegible] made the turn it [illegible] feet and came to a stop [illegible] Aside from the plaintiff, Campbell, Korer and Blumenthal, there were no other occurrences witnesses. [illegible] out various discrepancies in [illegible] ball, but these are [illegible] and it was within the province of the jury to [illegible] contends that either plaintiff or [illegible] in violation of the [illegible] defendant's truck [illegible] of speed, both Korer and Blumenthal [illegible] not going faster than 10 [illegible] to a stop within 20 feet [illegible] and Blumenthal said positively [illegible] any time before they [illegible] were crossing the [illegible] that he was looking [illegible] view all around the front of the truck, and [illegible]

person come in contact with the front part of his truck as he made the turn, is undisputed. Although plaintiff's counsel, in discussing the evidence, says that plaintiff was struck by the right front "side" of the truck, plaintiff himself consistently said that it was the front, or front end, of the truck that struck him. Obviously, the jury did not believe this, because Campbell, who was standing nearby, and looking in the same direction as plaintiff, saw the truck come around the corner, but did not see the actual impact, nor did any other witness except plaintiff testify that he was struck by the front end of the truck. We think the jury were justified in assuming from the evidence that plaintiff, for some reason which does not appear of record, but not through any fault of defendant's driver, walked or ran into the truck at the rear wheel, and that neither defendant's driver nor his helper saw plaintiff until after they heard the impact and brought their truck to a stop in order to see what had occurred.

The law applicable to the circumstances of this case is well settled. There was conflicting evidence as to the material facts, and the jury having seen the witnesses and heard them testify, were best fitted to pass upon the facts. Where the evidence of either party would support a verdict in his favor, this court will not disturb the verdict on the ground that it is contrary to the manifest weight of the evidence. (Whitsell v. Rising, 109 Ill. App. 91; Leeper v. Gay, 253 Ill. App. 176.)

Plaintiff criticizes three instructions given by the court to the jury. One is the so-called unavoidable accident instruction, No. 11, which reads as follows: "If an accident is unavoidable then no liability is incurred, whether as a result of it a person is greatly or slightly injured and so if you believe from the evidence of this case that so far as the defendant or its driver is concerned

person come in contact with the stone part of his [illegible] he made the turn, is unexplained. [illegible] the evidence, says that [illegible] "side" of the truck, [illegible] was the front, or front end, of [illegible] the jury did not believe this, [illegible] nearby, and looking in the cab [illegible] come around the corner, but did not [illegible] any other witness [illegible] front end of the truck. [illegible] from the evidence [illegible] appear of record, but not [illegible] walked or ran into the truck [illegible] defendant's driver [illegible] heard the impact and [illegible] see what had happened.

The law applicable to the [illegible] well settled. There was [illegible] facts, and the jury [illegible] were best fitted to [illegible] either party would [illegible] not disturb the verdict [illegible] manifest [illegible] of [illegible] Lodger v. Day, 258 Ill. [illegible] 100 Ill. App. [illegible]; [illegible] v. [illegible], 100 Ill. App. [illegible]; Lodger v. Day, 258 Ill. [illegible] 1914.)

Plaintiff [illegible] to the jury by the court [illegible] to the jury. One is the [illegible] No. 11, which reads [illegible] "If [illegible] no liability is insured, [illegible] result of the [illegible] greatly or [illegible] and [illegible] if you believe from the evidence of this case that so far [illegible] the defendant or its driver [illegible] consumed

the accident is unavoidable and without negligence on their part, then the plaintiff cannot recover against the defendant and you should find the defendant not guilty." We think there was ample evidence to justify this instruction, for if plaintiff bumped into the side of the truck, near the rear, as defendant's evidence indicated he did, then certainly the accident may have been unavoidable so far as defendant was concerned and without negligence on its part. A similar instruction, with only some differences in form, was approved in Carson Pirie Scott & Co. v. Chicago Rys. Co., 309 Ill. 346, where plaintiff's agent, driving a wagon, made a left turn in the path of an oncoming street car that was still a considerable distance away. The street car for no apparent reason failed to stop before hitting the right rear of the wagon.

Plaintiff also complains of instruction No. 13, as follows: "The plaintiff has charged in his complaint that on the occasion in question he was exercising ordinary care for his own safety. This is a material allegation of such complaint and the burden of proof is upon the plaintiff and he must prove such allegation by a preponderance or greater weight of the evidence in this case. Ordinary care is such care as a person of ordinary prudence and caution acting prudently would exercise under the same or like circumstances. If you believe from the evidence that on the occasion in question, the plaintiff failed to exercise ordinary care for his own safety and that such failure, if any, caused or proximately contributed to the injuries complained of, then the plaintiff cannot recover and you should find your verdict for the defendant."

It is argued that this instruction places an unusual burden on plaintiff by erroneously defining "ordinary care". Plaintiff does not argue that the giving of this instruction was reversible error, nor does he point out in what manner it was prejudicial to him. It is merely argued that the principle

the accident is unconditional. [illegible] If, [illegible] then the plaintiff's proof [illegible] and you should find the defendant not guilty," [illegible] evidence to justify this instruction, [illegible] the side of the [illegible], [illegible] evidence indicated he did, [illegible] the [illegible] have been unavoidable so far as [illegible] and [illegible] on its part. [illegible] eliminate the instruction, [illegible] difference in form, was approved in [illegible] v. [illegible], 302 Ill. 326, [illegible] turn in the path of an oncoming [illegible] reasonable diligence, [illegible] to stop before [illegible] the [illegible] of the [illegible].

Plaintiff also complains of the instruction [illegible], as follows: "The plaintiff has [illegible] in the case [illegible] in the question in question he was [illegible] to stand for his own safety. This is a material allegation of such consequence [illegible] burden of proof is upon the plaintiff and he must prove such [illegible] by a preponderance or greater weight of the evidence in this case. Ordinary care is such care [illegible] of ordinary prudence and caution acting prudently [illegible] or like circumstances. If you believe from the evidence that on the occasion in question, the plaintiff's [illegible] ordinary care for his own safety and that such [illegible], if any, caused or proximately contributed to the injuries complained of, then the [illegible] and you should find your verdict for the defendant."

It is argued that this instruction [illegible] burden on plaintiff by [illegible] "[illegible] plaintiff does not [illegible] reversible error, nor does he point out in [illegible] prejudicial to him. It is merely argued [illegible] the principle

stated in the instruction is not correct, because as a universal proposition it is not applicable to all cases. We cannot perceive how the jury could have been misled by this instruction.

The third instruction criticized is No. 25, which reads as follows: "While the driver of an automobile, in operating his vehicle, is bound to have regard to the rights and safety of others, yet he is not obliged to be all the while on his guard against the unusual, extraordinary and not reasonably to be expected. If you believe from the evidence that at the time and place in question the automobile was being operated with ordinary care, and if you further find that the plaintiff in going near the automobile, if he did so, acted in a manner that was unusual, extraordinary, or not reasonably to be expected, then it became the duty of the driver of the automobile to avoid the collision only as soon as he had notice, or in the exercise of due care might have had notice, of the intention of the plaintiff to act in any manner unusual, extraordinary or not reasonably to be expected, if he did so act. And if you believe from the evidence that the automobile driver did not, and in the exercise of due care could not have had notice of plaintiff's intention to do what he did - if you find from the evidence what he did was unusual, extraordinary, or not reasonably to be expected - in time to avoid injury to the plaintiff, then you must find your verdict for the defendant." The principal criticism levelled at this instruction is that it is not based on the evidence, but this criticism is not warranted because there is ample evidence to sustain the theory advanced by defendant, and evidently adopted by the jury, that defendant bumped into the side of the truck near the rear wheel, and that his conduct in this behalf was unquestionably extraordinary and not reasonably to be expected.

It is also urged that the court committed error in refusing

stated in the [illegible] no [illegible] [illegible] if proposition is not applicable. [illegible] [illegible] how the jury could have been [illegible] [illegible].

The third instruction criticized is [illegible] as follows: "While the driver [illegible] in operating his vehicle, is bound to have [illegible] the [illegible] of others, yet he is not obliged to be [illegible] against the unusual, extraordinary and [illegible] [illegible] peated. If you believe from the evidence [illegible] in question the [illegible] being operated [illegible] and if you further find that the plaintiff [illegible] if he did so, [illegible] not reasonably to be expected, [illegible] or of the automobile to avoid the collision [illegible] or in the exercise of the right of way [illegible] tion of the plaintiff to act in any manner [illegible] not reasonably to be expected, if he did so act. [illegible] from the evidence that the [illegible] exercise of the care which not if he had notice of plaintiff's [illegible] tion to do what he did - if you find from the evidence that he did was unusual, extraordinary, or not [illegible] time to avoid injury to the plaintiff, then you [illegible] dict for the defendant." The principal criticism for [illegible] instruction is that it is not based on the evidence, but this criticism is not [illegible] the theory advanced by [illegible] that defendant bumped into the side of the [illegible] and thus his conduct in this behalf [illegible] and not reasonably to be expected.

It is claimed that the court commits error in refusing

to give instructions Nos. 26 and 27. These instructions, which deal with the statutory provisions for yielding the right of way to pedestrians, are not applicable to crossings having traffic signal lights.

Lastly, it is argued that the court erred in modifying and changing instruction No. 1 offered by plaintiff, as follows: "The jury are instructed that it is incumbent upon those in control of a motor vehicle to exercise a greater degree of watchfulness at street intersections than at other places along the route." This instruction was modified by the court to read as follows: "The jury are instructed that it is incumbent upon both plaintiff and defendant to exercise due care at all times, and due care may require a greater degree of care or watchfulness at street intersections than at other places along the route." In his motion for a new trial plaintiff refers only to "certain instructions offered on behalf of defendant," whereas instruction No. 1 was not offered on behalf of defendant but by plaintiff, as he admits in his brief. Nevertheless, we think the instruction as modified more nearly conforms to the correct rule of law than plaintiff's instruction as originally offered. By connecting the subject of the instruction with ordinary care and changing the duty of watchfulness from a mandatory form to one conditioned upon what the jurors believed ordinary care required, the court made the instruction one of more general application. It certainly could not have produced any such confusion in the minds of the jurors as to constitute reversible error.

During the pendency of this suit a motion was made by defendant's counsel to dismiss the appeal. That motion was reserved to the hearing and is now denied.

We find no reversible error in the instructions complained of, and since in our opinion the verdict was not contrary to the manifest weight of the evidence, the judgment of the circuit court is affirmed. JUDGMENT AFFIRMED.

Sullivan and Burke, JJ., concur.

[illegible]

deal with the [illegible]

to pedestrians [illegible]

signal light.

[illegible]

changing in [illegible]

jury are in [illegible]

a motor vehicle [illegible]

street investigation [illegible]

ible instruction [illegible]

"The jury [illegible]

and defend [illegible]

require a [illegible]

sections then [illegible]

a new trial [illegible]

on behalf of defendant," [illegible]

on behalf of defendant [illegible]

Nevertheless [illegible]

forms to [illegible]

originally [illegible]

with order [illegible]

mandatory [illegible]

ordinary [illegible]

general [illegible]

counsel [illegible]

error.

[illegible]

defendant [illegible]

reserved to [illegible]

[illegible]

of, and [illegible]

manifest [illegible]

is still [illegible]

-William [illegible], continue.

39974

JOHN WILDT,
Appellant,

v.

CITY OF CHICAGO, a municipal corporation; GUY A. RICHARDSON and WALTER J. CUMMINGS, as receivers of CHICAGO RAILWAYS COMPANY, a corporation; HARVEY B. FLEMING and EDWARD E. BROWN, as receivers of CHICAGO CITY RAILWAY COMPANY and CALUMET & SOUTH CHICAGO RAILWAY COMPANY, corporations, doing business as CHICAGO SURFACE LINES,
Appellees.

A PEAL FROM
SUPERIOR COURT,
COOK COUNTY.

MR. PRESIDING JUSTICE FRIEND
DELIVERED THE OPINION OF THE COURT.

John Wildt, plaintiff herein, brought suit against the City of Chicago and the receivers for the several street car companies, doing business as Chicago Surface Lines, to recover damages for injuries sustained by him on a sidewalk in Chicago. At the conclusion of plaintiff's evidence the court peremptorily instructed the jury to return a verdict of not guilty as to all the defendants and this appeal by plaintiff followed.

The essential facts may be stated briefly as follows: Plaintiff lived on the second floor of his home at 8546 Maryland avenue, directly across the alley between Maryland and Cottage Grove avenues and approximately 160 feet from the sidewalk running along the east side of Cottage Grove avenue between 85th and 86th streets. He had a vegetable garden in the prairie, the west side of which was approximately 30 or 40 feet from the sidewalk running along the east side of Cottage Grove avenue. The accident

JOHN [illegible],

plaintiff,

v.

CITY OF [illegible], a municipal
corporation, [illegible]
and [illegible],
receivers of [illegible]
COMPANY, a corporation, [illegible]
B. [illegible],
as receivers of the [illegible]
RAILWAY COMPANY [illegible],
SOUTH OHIO [illegible],
corporation, John [illegible],
CHICAGO SURFACE [illegible],
[illegible]

[illegible]

John [illegible], [illegible] brought [illegible] the
city of [illegible] [illegible] the [illegible] street car
company, [illegible] [illegible], to recover
damages for injuries [illegible] in [illegible] to.
At the conclusion of plaintiff's [illegible] the court, [illegible]
instructed the jury to return a verdict [illegible] the
the defendant [illegible] by plaintiff's [illegible].

The [illegible] [illegible]
plaintiff lives [illegible] and
avenue, [illegible] [illegible]
Grove avenue and [illegible] left from the [illegible] the [illegible]
along the east side of [illegible] avenue between [illegible] 35th
street. It is [illegible] [illegible] in the [illegible] [illegible] side
of which was [illegible] [illegible] left from the [illegible] in running
along the [illegible] Grove avenue. The [illegible]

occurred July 25, 1936, at about 10:30 p.m. On the day in question and for some time prior thereto rather extensive reconstruction work was being done on the east or northbound street car track on Cottage Grove avenue, and a large amount of construction material of various kinds was being used. It was hauled in by trucks and dumped in piles from the curb toward and upon the sidewalk. The curb was 6 inches wide, and the parkway or space between the curb and sidewalk was but 18 inches. It was necessary to keep enough of the street east of the track free of this material, so that the workmen could move about with their wheelbarrows to and from the cement mixers and other equipment, and so that trucks would be able to pass back and forth. Because of these circumstances some of the construction material, which consisted of sand, gravel and crushed stone, which spreads out considerably when dumped, ran over onto the sidewalk, where it remained during the process of construction, until used.

Earlier in the evening of the day of the accident, and while it was still daylight, plaintiff had occasion to go to a hardware store on Cottage Grove avenue to purchase a hose connection. He did not use the sidewalk on Cottage Grove avenue, but walked down Maryland avenue to 87th street, because he knew that 86th street had been blocked off during the period of construction. After returning from the hardware store, he watered the vegatables in the garden, returned to his house and repaired a broken hose connection. It then occurred to him that he had left some pails in the prairie near his garden, and he went back to get them. He found no pails, however, and instead of going back to the house through the garden he decided to walk around by way of the sidewalk on Cottage Grove avenue, "to see how far they were progressing at 86th street with the repairs." He entered the sidewalk from the prairie at about 150 feet north of 86th street. There is considerable evidence concerning street lights on

country. [illegible] 1910, [illegible] station
and for some time [illegible] work
was being done on the [illegible] cottage
grove avenue, [illegible] of
kinds was being [illegible]
from the [illegible]
wide, and the [illegible]
18 inches. [illegible] of
the track free of [illegible]
with their [illegible]
equipment, [illegible]
Because of the [illegible] of the [illegible]
which [illegible]
considerably when [illegible]
machined during the process [illegible]

Earlier in the [illegible] it was still [illegible] store on Lottage [illegible]
did not use the [illegible] Maryland avenue to [illegible]
had been block [illegible]
ing from the [illegible]
returned to his [illegible]
occurred to him [illegible]
garden, and [illegible]
and instead of [illegible]
to walk around by [illegible]
how far they [illegible]
entered the [illegible] street. The [illegible]

Cottage Grove avenue, some of the witnesses testifying that there were lights on every other pole, as well as a series of pot lights or torches along the track which was being repaired. As he walked along the sidewalk he stepped on a pile of sand or crushed stone, stumbled onto another pile of material, and finally fell on some broken concrete and paving blocks, sustaining severe injuries.

Although the City of Chicago and counsel for the Surface Lines argue at length that the court was justified in directing a verdict in their favor upon the question of defendants' negligence, the principal question presented is whether or not plaintiff was in the exercise of due care and caution for his own safety.

Plaintiff was the only person present when the accident occurred, and since his testimony is the only evidence as to the manner in which the accident happened, there can be no question of conflicting evidence in that respect. He testified: "I knew they were working there on Cottage Grove; I saw them changing the rails in the street car tracks and throwing it over toward the curb and the sidewalk. I could see that from the house." He also testified that the vegetable garden in which he worked ran approximately thirty or forty feet from the Cottage Grove avenue sidewalk; that the sand pile was about two feet high and "possibly took in all the sidewalk or maybe a foot or a foot and a half and was clear next to the prairie." After stepping onto the sidewalk he fell over one of the piles, stumbled into another, and then onto a third pile, and he described the first and second piles as possibly two feet apart, although one of the witnesses said that they were about 20 feet apart. The third pile onto which he fell was between the curbing and the sidewalk, "possibly a foot or a foot and a half high," and "was possibly a few inches high where it fell over the sidewalk." He also said that "there was nothing wrong with the sidewalk itself." From this it would appear that plaintiff sus-

Cottage Grove avenue, some of the lanes being lighted, but there were lights on every other pole, or a total of [illegible] of pole lights or torches along the street which was being repaired. He walked along the sidewalk he stepped on a pile of sand or crushed stone, stumbled onto another pile of material, and finally fell on some broken concrete and paving blocks, sustaining severe injuries.

Although the city of Chicago and counsel for the surface lines argue at length that the court was justified in directing a verdict in their favor upon the question of defendants' negligence, the principal question presented is whether or not plaintiff was in the exercise of due care and caution for his own safety.

Plaintiff was the only person present when the accident occurred, and since his testimony is the only evidence as to the manner in which the accident happened, there can be no question of conflicting evidence in that respect. He testified: "I saw they were working there on Cottage Grove; I saw them changing the rails in the street car tracks and throwing it over toward the curb and the sidewalk. I could see that from the house." He also testified that the vegetable garden in which he took a turn approximately thirty or forty feet from the Cottage Grove avenue sidewalk; that the sand pile was about two feet high and "possibly took in all the sidewalk or maybe a foot or a foot and a half and not closer next to the property." After stepping onto the sidewalk he fell over one of the piles, stumbled into another, and then onto a third pile, and he described the first and second piles as possibly two feet apart, although one of the witnesses said that they were about 20 feet apart. The third pile onto which he fell was between the curbing and the sidewalk, "possibly a foot or a foot and a half high," and "was possibly a few inches high where it fell over the sidewalk." He also said that "there was nothing wrong with the sidewalk itself." From this it would appear that plaintiff ma-

tained his injury from a pile which was not on the sidewalk, but between the sidewalk and the curb. In addition to the testimony of other witnesses, plaintiff himself testified that there were street lights on the west side of Cottage Grove avenue on trolley poles, and the undisputed evidence discloses that these lights and other lights along the rails afforded ample opportunity to see at least the outline of the objects over which he fell. From the second floor of his house, which was only 160 feet from the place of the accident, and from the vegetable garden where he frequently worked, he could see the nature of the work being carried on, and in fact he testified that "I saw them changing the rails in the street car tracks. I could see that from the house, and I saw them tearing up the street. I knew they were working there. I did not know what they were doing with the material. As far as I knew, they were throwing it over toward the curb and sidewalk, putting it out of the way on the east side of Cottage Grove." He also knew that the street was blocked off on the east side of Cottage Grove, because in his walk to the hardware store earlier in the evening he had traveled along Maryland avenue to 87th street because 86th street was blocked.

It is urged by defendants that the evidence adduced by plaintiff clearly and convincingly shows that plaintiff, before and at the time of the accident, was not in the exercise of ordinary care for his own safety, and that the motion of defendants for a directed verdict at the close of plaintiff's case was properly allowed. The law applicable to negligence and contributory negligence is well settled in this state. In the absence of willful or wanton injury on the part of defendant, the plaintiff cannot recover in an action for personal injuries unless it appears that he was in the exercise of ordinary care for his own safety, "and in such case it is the duty of the court to direct

tained his injury from a pile which was not on the sidewalk, but between the sidewalk and the curb. In addition to the testimony of other witnesses, plaintiff himself testified that there were street lights on the west side of Cottage Grove Avenue on trolley poles, and the undisputed evidence discloses that these lights and other lights along the route afforded ample opportunity to see at least the outline of the objects over which he fell. From the second floor of his house, which was only 150 feet from the place of the accident, and from the vegetable garden where he frequently worked, he could see the nature of the work being carried on, and in fact he testified that "I saw them dragging the piles in the street car tracks. I could see that from the house, and I saw them tearing up the street. I knew they were working there. I did not know what they were doing with the material. As far as I knew, they were throwing it over toward the curb and sidewalk, putting it out of the way on the east side of Cottage Grove." He also knew that the street was blocked on the west side of Cottage Grove, because in his walk to the hardware store a block in the evening he had traveled along Maryland Avenue to 87th street because 86th street was blocked.

It is urged by defendants that the evidence adduced by plaintiff clearly and convincingly shows that plaintiff, before and at the time of the accident, was not in the exercise of ordinary care for his own safety, and that the motion of defendants for a directed verdict at the close of plaintiff's case was properly allowed. The law applicable to negligence and contributory negligence is well settled in this state. In the absence of wilful or wanton injury on the part of defendant, the plaintiff cannot recover in an action for personal injuries unless it appears that he was in the exercise of ordinary care for his own safety, "and in such case it is the duty of the court to direct

a verdict for the defendant if there is no evidence tending to show affirmatively that the plaintiff was exercising due care or to raise a reasonable inference of such care. A party has no right to knowingly expose himself to danger and then recover damages for an injury which he might have avoided by the use of reasonable precaution." (Illinois Central R. R. Co. v. Oswald, 338 Ill. 270, 274-75.) "When there is any evidence before the jury which, taken with its reasonable inferences in its aspect most favorable to the plaintiff, tends to show the use of due care, the question of due care is one for the jury. Whether there is any such evidence is a question of law." (Dee v. City of Peru, 343 Ill. 36, 42.)

In the early case of City of Chicago v. Richardson, 75 Ill. App. 198, the court said (p. 202): "There is no evidence of any special precaution having been taken by appellee, such as her knowledge of the danger would reasonably require. *** Ordinary care is a question of fact for the jury when there is evidence for the jury to consider upon that point."

In City of Highland Park v. Gerkin, 122 Ill. App. 149, plaintiff sustained injuries while walking along a sidewalk, and the court, in discussing the question of contributory negligence, pointed out that plaintiff did not herself testify as to the manner in which she was walking, or whether she was observing any care passing over the sidewalk or not, and held (p. 153): "While there was no proof offered to show careless or negligent conduct of appellee [plaintiff] in passing over the walk, neither was there any proof offered to show care and caution. In view of her knowledge of the unsafe condition of the sidewalk, some proof that she was in the exercise of ordinary care was indispensable to her right of recovery." (Italics ours.)

Likewise, in Village of Lockport v. Licht, 113 Ill. App.

a verdict for the defendant if there is no evidence tending to show affirmatively that the plaintiff was exercising due care or to raise a reasonable inference of such care. ... Surely has no right to knowingly expose himself to danger and then recover damages for an injury which he might have avoided by the use of reasonable precaution." (Illinois Central R. R. Co. v. Oswald, 288 Ill. 272, 274-75.) "When there is any evidence before the jury which, taken with its reasonable inferences in its aspect most favorable to the plaintiff, tends to show the use of due care, the question of due care is one for the jury. Whether there is any such evidence is a question of law." (Lee v. City of Peru, 240 Ill. 58, 62.)

In the early case of City of Chicago v. Kinnebrew, 75 Ill. App. 188, the court said (p. 20): "There is no evidence of any special precaution having been taken by appellee, such as her knowledge of the danger would reasonably require. ... Ordinarily care is a question of fact for the jury when there is evidence for the jury to consider upon that point."

In City of Mt. Olive v. Gerkin, 102 Ill. App. 159, plaintiff sustained injuries while walking along a sidewalk, and the court, in discussing the question of contributory negligence, pointed out that plaintiff did not herself testify as to the manner in which she was walking, or whether she was observing any care passing over the sidewalk or not, and held (p. 163): "While there was no proof offered to show carelessness or negligent conduct of appellee [plaintiff] in passing over the walk, neither was there any proof offered to show care and caution. In view of her knowledge of the unsafe condition of the sidewalk, some proof that she was in the exercise of ordinary care was indispensable to her right of recovery." (Italics ours.)

Likewise, in Village of Lockport v. Mohr, 113 Ill. App.

613, the court pointed out that (p. 616) "It is not shown what care, if any, appellee used in selecting the way over which he sought to pass the pole. *** It is impossible to say from this record whether appellee had his team well in hand and driving slowly and carefully, or whether he was going at a full trot, or listlessly and carelessly allowing the team to jog at pleasure."

In Morgan v. Rockford, Beloit & Janesville Ry. Co., 251 Ill. App. 127, the court pointed out that the only eyewitness in the case testified that the deceased said and did nothing, and that there was no affirmative proof in the record tending to show due care on the part of the intestate, and the court there held (p. 133) that "before a party can recover for an injury alleged to have been caused by the negligence of another, he must prove affirmatively the exercise of due care for his own safety," citing numerous Illinois decisions.

We find nothing in plaintiff's testimony indicating what effort, if any, he made to ascertain conditions in existence on the sidewalk, which was but two feet from the street pavement. Neither does the record disclose that he offered any testimony as to the manner in which he undertook to walk on the sidewalk, in view of the circumstances surrounding him. We are unable to ascertain whether he walked slowly or rapidly, or at a medium gait, or whether he undertook to walk in a manner that an ordinarily prudent man would walk in the dark, where he could not see well, and at a place which he knew had been partly obstructed by piles of sand, crushed stone and other building material. The reasonably prudent man, walking in the dark where he could not see well, and with knowledge of the surrounding conditions, such as plaintiff admits he had, would not have proceeded at a gait which would create sufficient momentum to cause him to fall over two piles

OIS, the court over [illegible] (p. 10) "[illegible] not [illegible] but case, if any, appellee [illegible] in following the [illegible] no sought to place the jury [illegible] is impossible to say from this record whether appellee [illegible] the team well in hand and driving slowly and carefully, or whether he was [illegible] full speed, or listlessly and carelessly allowing the team to jog along at pleasure."

In Morgan v. Lockford, Bolich & Jamesville Ry. Co., [illegible] Ill. App. 187, the court pointed out that the only evidence in the case tending [illegible] the deceased had died nothing, and that there was no [illegible] in the record tending to show due care on the part of the deceased, and the court [illegible] held (p. 188) that [illegible] could not recover for an injury alleged to have been [illegible] by the negligence of another, he must prove affirmatively the exercise of due care for his own safety," citing numerous [illegible].

[illegible] Illinois [illegible] that [illegible] effort [illegible] the [illegible] neither [illegible] to the [illegible] view of the [illegible] certain [illegible] or [illegible] prudent man [illegible] and [illegible] of [illegible] prudent [illegible] with [illegible] admit [illegible] great [illegible]

of material and onto a third one.

In view of the authorities hereinbefore cited, and others appearing in the briefs filed by defendants herein, all holding that it was incumbent upon plaintiff to prove affirmatively that he was in the exercise of due care for his own safety, we are constrained to hold that the trial court properly held that as a matter of law there was no evidence which could properly be submitted to the jury on this phase of the case.

The judgment of the Superior court should be affirmed, and it is so ordered.

JUDGMENT AFFIRMED.

Sullivan and Burke, JJ., concur.

of material rec on [illegible] .

In view of the [illegible] , and others [illegible] , will holding this [illegible] , or [illegible] ly that he [illegible] , we are come [illegible] as a matter of [illegible] be submitted [illegible] .

The [illegible] would [illegible] and it is so ordered.

[illegible]

Sullivan and Orr, Inc., [illegible]

40017

40A

HERMAN BAUER,
Appellee,

v.

JOSEPH B. FORD,
receiver,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

297 I.A. 640[3]

MR. PRESIDING JUSTICE FRIEND
DELIVERED THE OPINION OF THE COURT.

Herman Bauer, plaintiff, rented a basement apartment at 1500 South Albany avenue, Chicago, from Joseph B. Ford, receiver, under a month to month tenancy, at a stipulated rental of $10 a month. About eight months after he took possession, plaintiff injured his hand on the porcelain handle of a faucet over the kitchen sink, and brought suit for damages against the receiver. Trial was had by jury, resulting in a verdict and judgment for $200, from which defendant appeals.

All negotiations prior to the letting were carried on between Ann Bauer, plaintiff's wife, and one Kuklin, defendant's agent. Plaintiff inspected the apartment before moving into it, and admittedly Kuklin made no promises concerning repairs in the demised premises. Shortly after plaintiff and his family took possession he noticed a crack in the porcelain handle of the cold water faucet, and also observed that the faucet stuck so that there was a constant dripping of water. This condition persisted up to the time of the accident. Plaintiff claims, and his wife testified, that on several occasions before plaintiff was injured complaints had been made to the janitor, not about

the crack in the porcelain handle, but of the constant dripping of water, and that the janitor on several occasions tried to remedy this defect, but without success. The janitor denied that he had ever been requested to repair the faucet, and also that he had attempted any repairs. No complaints were ever made to Kuklin, the receiver's agent, although he was around the premises two or three times a week. At the time of the accident plaintiff had drawn a glass of cold water and then closed the faucet. The water continued to drip, and while he was pushing the faucet trying to stop the leak the porcelain handle gave away, resulting in an injury to his right hand.

Plaintiff has filed no brief on appeal in support of the judgment. The law in this state appears to be well settled, however, that the doctrine of caveat emptor applies to the circumstances of this case, and that the landlord was not bound to make repairs unless he had agreed to do so. In Long v. Joseph Schlitz Brewing Co., 214 Ill. App. 517, it was held under similar circumstances that the tenant takes the property at his own risk as he finds it, and that the landlord is not liable for damages in case the tenant is injured by reason of the premises being out of repair. To the same effect are Sunasack v. Morey, 196 Ill. 569, and Borggard v. Gale, 205 Ill. 511.

Plaintiff's counsel evidently recognized this rule of law when drawing the complaint, for it is alleged that "prior to the time plaintiff entered the said premises as a tenant, the defendant undertook and agreed to keep all parts of the demised premises in good and safe repair," but that "contrary to his undertaking, the defendant permitted the faucet in the kitchen sink *** to become and remain in a defective condition ***." There is no evidence of record, however, to sustain this averment, and plaintiff

the crack in the [illegible] pipe, but on the [illegible] of water, an [illegible] reasonable steps to remedy the [illegible] that he had [illegible] the tenant, and also that he had [illegible] to Nuklin, the [illegible] two or three times [illegible] drawn a plane of [illegible] continued to [illegible] the leak the [illegible] to his right hand.

[illegible] judgment. [illegible] ever, there [illegible] absence of [illegible] repairs under [illegible] Drawing Co., [illegible] absence that the [illegible] finds it, and [illegible] the tenant is [illegible] repair. [illegible] and Borgman [illegible]

[illegible] when drawing [illegible] time plaintiff [illegible] ant underlook [illegible] in good [illegible] the defendant [illegible] come and remain [illegible] dence of room [illegible]

evidently proceeded upon the theory that the landlord is liable because the janitor gratuitously undertook to repair the defect, after plaintiff had taken possession of the premises. The evidence on this question of fact is in conflict, but, assuming that the janitor had made several attempts to repair the leak, nevertheless, a promise to repair, made after the letting, is nudum pactum. It was so held in May v. DiCenso, 277 Ill. App. 248, and in Watson v. Moulton, 100 Ill. App. 560, wherein the court said that "a promise to repair, made after the lease is entered into, is a mere nudum pactum, and no liability exists on his part to make such repairs," citing Wood's Landlord and Tenant, sec. 382; Lucas v. Coulter, 104 Ind. 81; and Humiston, Keeling & Co. v. Wheeler, 175 Ill. 519.

Even though the janitor may have attempted to repair the leak, there is nothing in the record to indicate that he attempted to repair the broken porcelain handle on the faucet, that he was in anywise negligent in his attempted repairs, or that he rendered the faucet more dangerous than it had been, or in anywise contributed to the cause of the accident. The faucet and all its appurtenances remained in exactly the same condition after the janitor's futile efforts to repair it, and this fact was known to plaintiff, who lived in the apartment several months and had constantly used the faucet in question, was thoroughly acquainted with its condition and was admittedly aware of the crack in the handle. Under the decisions, where a tenant has knowledge of the defective or dangerous condition in the rented premises for a considerable period of time, and continues to remain as a tenant and use the premises without making repairs, he is guilty of contributory negligence. (Palmer v. Byrd, 131 Ill. App. 495; Martin v. Surman, 116 Ill. App. 282; Foyna v. Chicago Title & Trust Co., 296 Ill. App. 227.)

evidently [illegible]
become the [illegible]
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and contra [illegible]
makin [illegible]
Pre [illegible] Towns

v. Chicago Title & Trust Co., 206 Ill. [illegible] p. 427.)

We are unable to perceive any legal theory upon which plaintiff is entitled to recover under the circumstances disclosed by the evidence, and therefore the judgment of the municipal court is reversed and the cause remanded.

JUDGMENT REVERSED AND CAUSE REMANDED.

Sullivan and Burke, JJ., concur.

39562

ISIDORE SIMON,
Appellant,

v.

ARTHUR D. FOYER,
Appellee.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

297 I.A. 640

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

Plaintiff seeks to set aside an order of the Circuit court dismissing the cause for want of prosecution and also to vacate an order which set aside a judgment for $2,000. On April 5, 1930, plaintiff filed his declaration in tort, charging malicious prosecution. Defendant was defaulted for want of an appearance and plea and three days thereafter an appearance and jury demand were filed, and on August 28, 1930, a plea of the general issue was filed. The cause was continued from time to time and on September 23, 1936, was set for trial. On October 14, 1936, in the absence of defendant and his attorney, the case was called for trial and on an ex parte trial the jury found defendant guilty and assessed plaintiff's damages at the sum of $2,000. The jury returned a special finding that malice was the gist of the action. Judgment was entered on the verdict. On October 22, 1936, a verified petition to vacate the judgment was filed on behalf of defendant. Defendant, a traveling salesman, was away and the petition was set down to be heard on November 13, 1936, when the court sustained the motion to vacate the judgment. The cause was then set down for trial. When it came on for trial, on January 29, 1937, plaintiff elected to stand by the judgment and refused to appear and prosecute, whereupon the cause was dis-

39662

[illegible]

[illegible]

v.

ARTHUR D. [illegible]

[illegible]

MR. JU[illegible]

[illegible]

court [illegible]

to vacate [illegible]

pril 8, 1936, [illegible]

malicious pro[illegible]

appearance [illegible]

jury demand [illegible]

general issue [illegible]

time and on [illegible]

14, 1936, in the [illegible]

was called for [illegible]

defendant [illegible]

$2,000. The [illegible]

list of the [illegible]

October 20, 1936, [illegible]

filed on behalf [illegible]

was ready [illegible]

1936, when [illegible]

the [illegible]

on January 2, 1937, [illegible]

and refused to [illegible] the [illegible] dis-

missed for want of prosecution and a judgment rendered against plaintiff for costs.

Paragraph(7) of section 50 of the Civil Practice act (Ill. Rev. Stat. 1937, ch. 110, sec. 174) provides that the court may within thirty days after entry thereof set aside any judgment upon good cause shown by affidavit. Plaintiff asserts that the good cause on which the court is to base action must appear in the affidavit by way of averment of ultimate facts and that statements that are in the nature of conclusions are to be disregarded. He insists that the verified petition does not set forth a good and meritorious defense and that it fails to show due diligence.

The case was pending for more than six years. Defendant filed his appearance and plea after he had been defaulted. However, plaintiff took no steps to prove up damages and have a judgment entered, and apparently decided not to make any point of the delay. That is shown by the action of plaintiff in serving and filing a notice that the cause be placed on the trial calendar, on October 2, 1931. It will be noted that the cause was stricken from the trial calendar on September 17, 1934, and was dismissed without costs on September 22, 1936. The order of dismissal was vacated on the following day and the cause placed on the trial calendar. The verified petition was prepared by defendant's attorney while defendant was out of the city. When the motion was heard defendant, a layman, acted as his own counsel. He also acted as his counsel in the conduct of the appeal and in the oral argument before this court. He stated that he was without financial means to employ counsel and that if the judgment stands he will be unable to pay it and, therefore, in all probability will be incarcerated in the County jail by virtue of the issuance of a capias ad satisfaciendum. The report of trial proceedings as to the hearing on the motion to set aside the judgment was prepared and presented by plaintiff and admittedly

[illegible] mission [illegible] that plaintiff [illegible] for [illegible].

Paragraph(7) of [illegible] Nev. [illegible], 1927, [illegible] within thirty days [illegible] good cause [illegible] cause on which the [illegible] affidavit by way of [illegible] that are in the nature of [illegible] indicate that the [illegible] meritorious defense [illegible] how [illegible] diligence.

The case was [illegible] filed his appearance and plea [illegible] over, plaintiff took no [illegible] have [illegible] ment entered, and [illegible] delay. That is shown by the motion of plaintiff [illegible] filing a notice that the [illegible] October 2, 1931. It will be not [illegible] the trial calendar [illegible] coats on September 21, 1931. [illegible] on the following day the [illegible] verified petition was presented by [illegible] ment was out of the city. [illegible] lawyer, acted as his own counsel. [illegible] the conduct of the appeal in the [illegible] He stated that he was [illegible] that if the judgment [illegible] fore, in all probability [illegible] virtue of the issuance of [illegible] of trial proceedings [illegible] the judgment [illegible]

does not set out all that took place before the trial judge. Defendant, in his brief, sets out statements that he says were made before the trial court, and on the oral argument plaintiff's attorney conceded that such statements were made and that if the statements were incorporated in the verified petition the action of the court in vacating the judgment would be proper. Defendant's brief recites that plaintiff's attorney "advised the court that the petition filed by attorney Kotin [then counsel for defendant] was defective in that it merely pleaded the general issue without setting up a proper defense. The court thereupon read the petition and agreed with the contention of attorney Baumgartner [counsel for plaintiff], and turning to this defendant asked him to state orally what the defense was and the general circumstances surrounding the cause." Defendant thereupon made the statement set out in his brief, which it is conceded constitutes a good defense, as follows:

"In an evil hour I purchased from Isidore Simon, the plaintiff, two vacant lots in the Calumet District; Isidore Simon being a real estate sub-divider. These lots were purchased by me under a signed and written contract which provided that I make equal monthly payments to the Woodlawn Trust & Savings Bank of Chicago, trustee. Pursuant to this contract I made all the payments required of me, the final one in May, 1929; at which time I was entitled to receive under the contract entered into a clear deed and a guaranteed policy. The total amount of the payments so made by me being $2200.00. Not receiving either the deed or the policy I contacted Isidore Simon, but only received an evasive reply and promises which were never fulfilled, and I continued to contact him repeatedly throughout the remainder of the spring, summer and early fall of 1929 without being able to secure either the deed or policy to the lots I had purchased. I also contacted the Woodlawn Trust & Savings Bank repeatedly during this same period, but they too stated they were unable to convey the property to me. Finally, about November 1, 1929, after nearly six months of patient and diligent effort, I placed the matter in the hands of attorney George N. Kotin, turning over to him the contract together with all the letters that had passed between Isidore Simon, the Woodlawn Trust & Savings Bank and myself. After an examination of same he advised the arrest of Isidore Simon for fraud and for obtaining money under false pretenses, reading to me a statute of the Illinois Laws which he stated covered acts of the character I was a victim of. I said to him: 'George, I hate to have anybody put in jail. Isn't there some notice or warning you can give Simon or the bank so that they will be given an opportunity to make good without resorting to such drastic measures?' He replied: 'Foyer, you have already given them nearly six months to make good, but if you insist I'll write them both a letter embodying the statute I just read to you, and give them 48 hours in which to either

does not set out [illegible] self-serve.

Defend ant, in his brief, [illegible] are more made before me and I do [illegible] on the [illegible] attorney concerned [illegible] and when is the statements were incorporated [illegible] verify or [illegible] the contents of the court in verifying [illegible] judgment could be [illegible]. Defendant's brief recite [illegible] "[illegible] the position [illegible] merely plead [illegible] defense. The court [illegible] the contention [illegible] the constitution of Illinois [illegible] and turning to this [illegible] the defense [illegible] counsel [illegible] counsel."

[then counsel for defendant]

brief, which is in [illegible] form [illegible] follows:

"In an evil hour [illegible] plaintiff, the vendor [illegible] being a real [illegible] me under a [illegible] equal monthly payments to the [illegible] Chicago, Illinois. [illegible] months required me, the first one [illegible] I was entitled to receive [illegible] deed and a guaranteed title. The total amount of the payments made by me being [illegible] policy I contended [illegible] reply and practice which [illegible] to contract [illegible] summer and early [illegible] the deed or abstract [illegible] period, but [illegible] to me. [illegible] of patient [illegible] of attorney [illegible] rather with [illegible] the woodman [illegible] of same [illegible] obtaining money [illegible] the Illinois [illegible] I was [illegible] put in jail. [illegible] or the work [illegible] without [illegible] you have [illegible] if you insist [illegible] I just read [illegible]

deliver a clear title to the lots you bought or else we will rescind the contract and demand the return of the money you paid them. Then if they don't come across we will have Simon arrested.' I told him that seemed like a much better course to pursue. He then called in his stenographer and in my presence dictated a letter to both the Woodlawn Trust & Savings Bank and Isidore Simon, substantially as stated above, sending these letters via registered mail. The following day both the Woodlawn Trust & Savings Bank and Isidore Simon called attorney Kotin on the telephone, acknowledging receipt of his letter to them, stating in substance they were unable to convey the property to me and refusing to refund the purchase money. Thereupon attorney Kotin called into consultation his law partner, William J. Cainer, and after consulting with each other and looking up the law they advised me to have Isidore Simon arrested.

"Acting on the advice of counsel I thereupon signed a warrant for the arrest of Isidore Simon, while at the same time attorney Kotin prepared a civil action in which he joined both the Woodlawn Trust & Savings Bank and Isidore Simon, rescinding the contract and demanding the return of all the monies I had paid under it.

"When the criminal proceedings against Isidore Simon came up for hearing * * * an actual trial was had in which I was a witness and testified from the witness stand. In the course of the trial Isidore Simon produced what purported to be a clear deed to the lots I had purchased and declared his willingness to turn it over to me, but I refused to accept it as I had already filed suit to rescind the contract together with a demand for the return of all the monies I had paid under it. Whereupon His Honor * * * permitted Isidore Simon to go free, first admonishing him, however, to take no action against me for the arrest. * * *

"However, in the civil action rescinding the contract and recovering back the $2200.00 I had paid under it, the above mentioned deed was again produced in court and proffered me, but an examination of it revealed that it was not a clear deed at all, but subject to liens and mortgages, while the Abstract of Title which was also introduced in evidence, showed there was a blanket mortgage on the entire subdivision in which these lots were located, which mortgage was held by the Calumet Trust Co. in the amount of $25,000.00, and still remained unpaid at the time the civil action was tried in June, 1931. His Honor [illegible] before whom the civil action was heard, awarded me the entire $2200.00 I had paid for the lots together with taxes, interest and costs. In this action I was represented by Herbert Green, a lawyer of high standing who has practiced law in Cook County for many years, with offices in the First National Bank Building, Chicago. The attorney fee paid Mr. Green was in excess of $500.00."

It is apparent that the court in vacating the judgment considered the petition and the statement made by defendant. The record is silent as to whether the statement was or was not under

deliver [illegible] to the [illegible] on [illegible]. [illegible] receipt of [illegible] the [illegible] of the money you paid them. When [illegible] we will have [illegible] arrested." [illegible] to purchase. He then called [illegible] and in [illegible] presence [illegible] the [illegible] Bank and [illegible] above, [illegible] these letters [illegible] the following day with the Woodlawn [illegible] and [illegible] attorney [illegible] letter to them, [illegible] the property [illegible] money. Thereupon [illegible] partner, [illegible] and looking up the [illegible] arrested.

"[illegible] warrant for the [illegible] attorney [illegible] the woodlawn [illegible] the contract [illegible] paid under it.

"When the criminal [illegible] came before Judge [illegible] was a witness and [illegible] course of the trial [illegible] a clear deed to the lots [illegible] mess to turn [illegible] already filed suit [illegible] for the return of all the money [illegible] His Honor [illegible] permitted Ludwig [illegible] behind him, however, [illegible] $2500.00."

It is apparent [illegible] considered the political [illegible] record to which [illegible] paid under [illegible]

oath. After preparing the petition Attorney Kotin did not appear in court to argue the motion and defendant argued it himself. Although defendant had been defaulted plaintiff proceeded, apparently on the assumption that the case was contested, and when the case went ahead on the basis of an ex parte trial the verdict submitted was the form that is ordinarily used in a contested case. The well settled rule in this state is that a motion to set aside a judgment or a default is addressed to the sound discretion of the court and that unless it appears that such discretion has been wrongfully or oppressively exercised this court, on appeal, will not interfere. (Eggleston v. Royal Trust Co., 205 Ill. 170, 178; Culver v. Brinkerhoff, 180 Ill. 548.) The question for us to decide is whether the trial court abused its discretion in granting defendant an opportunity to have his day in court. It is interesting to observe that on motion of the attorney for defendant the cause was dismissed without costs, on September 22, 1936. On the following day the order of dismissal was vacated and the cause was placed on the trial calendar. The notice served on defendant's attorneys on September 22, 1936, and the order entered the following day do not indicate that any affidavit or verified petition was presented. An order of dismissal for want of prosecution is a final order and judgment in the cause, and is governed by the provisions of paragraph (7), section 50, of the Civil Practice act. After the dismissal order was vacated the attorney of record for defendant received a telephone call from the clerk in the Assignment court stating that the case had been set for trial. He sent a letter to defendant, which letter was returned with a notation that defendant had moved. He thereupon telephoned Attorney Beerly (who had succeeded Attorney Kotin but had not been substituted of record) who stated that he had no further interest in the matter and that he would not appear. He then obtained an address from plaintiff's

oath. After preparing the petition [illegible] attorney [illegible] never appear in court to argue the motion [illegible] defendant [illegible] himself.

Although defendant had been a party [illegible] plaintiff proceeded, apparently on the assumption [illegible] the case was contested, and when the case went alone on the basis of an exchange with the verdict submitted was the form [illegible] finally [illegible] in a contested case. The well [illegible] in this state is that a motion to set aside a judgment or a default is addressed to the sound discretion of the court [illegible] appears that such discretion has been wrongfully or oppressively exercised the court, on appeal, will not interfere. (Mahaffey v. Cecil [illegible], 208 Ill. 170, 178; Mulvey v. [illegible], [illegible] Ill. [illegible].) The question for us to decide is whether the trial court abused its discretion in granting defendant an opportunity to have his day in court. It is interesting to observe that on motion of the attorney for defendant the cause was dismissed without [illegible], on September 8, 1936. On the following day the order of dismissal was vacated and the cause was placed on the trial calendar. [illegible] notice [illegible] on a [illegible] attorney on [illegible], 1936, and the cause [illegible] the following day do not indicate that any [illegible] or verified petition was presented. [illegible] for leave of protection in a [illegible] order and [illegible] and [illegible] by the provisions of paragraph [illegible], section [illegible], of the Civil Practice Act. After the dismissal order [illegible] of a [illegible] for defendant received a telephone call from [illegible] in the [illegible] court stating that the [illegible] had been not [illegible]. [illegible] a letter to defendant, which [illegible] not [illegible] defendant had moved. He then [illegible] telephoned attorney Henry [illegible] who had succeeded Attorney Tolin but had not been substituted of record) who stated that he had no further interest in the matter and that he would not appear. He then obtained an affidavit from plaintiff's

attorney and wrote defendant at Ravinia, Illinois. The case came on for trial on October 14, 1936, while the attorney of record was actually engaged in a trial and he sent his clerk into court but was informed that the case would not be continued, whereupon a jury was impaneled and a verdict returned and judgment entered. On October 19 he received a letter from defendant acknowledging the receipt of a previous letter sent to defendant at Ravinia, Illinois, which letter had been forwarded to defendant, and defendant stated he wished the attorney to have the case continued until his return to the city about November 3, 1936. It was then that Attorney Kotin prepared the petition. He declares in the petition that he is acquainted with the facts in connection with the case, that he believes that defendant has a good defense, and that "upon a trial of this cause it will be shown that the defendant is innocent towards the plaintiff and the plaintiff is not entitled to any judgment whatsoever against the defendant." In effect the statement amounts to a plea of the general issue, which was the plea that defendant had filed. It will be observed that Attorney Kotin is the one who (according to the statement made by defendant before the trial judge) advised defendant, after consultation with his law partner, William E. Gainer, to have plaintiff arrested. From the proceedings before the trial judge it appears that defendant, on a trial, would be able to introduce evidence which would tend to show that there was probable cause for instituting the criminal prosecution; that he acted on the advice of two attorneys after a full disclosure and due consideration, and that he was not actuated by malice. Such defenses, if established on the trial, would be a bar to the action.

We are satisfied that defendant exercised due diligence in presenting his motion to vacate. As pointed out, the verified petition, in effect, is a plea that defendant is not guilty of the

attorney [illegible] on for trial on [illegible] actually [illegible] was informed that [illegible] was impossible [illegible] October 16 [illegible] receipt of [illegible] which letter [illegible] he wished the [illegible] to the only [illegible] prepared the [illegible] sequently [illegible] believe that [illegible] of this [illegible] the plaintiff [illegible] answer against [illegible] place of the [illegible] filed. [illegible] (according to [illegible] advised defendants [illegible] g. Gainer, [illegible] the trial [illegible] to introduce [illegible] able counsel for [illegible] on the review of [illegible] administration [illegible] if established on the trial [illegible]

[illegible] in personal [illegible] petition, [illegible] the

wrong and injury. The court acted on the petition and the statement made by defendant. We call attention to paragraph (2) of section 69 of the Civil Practice act (Ill. Rev. Stat. 1937, ch. 110, sec. 193):

> "Whenever in any suit or proceeding at law or in equity in any court of record, evidence shall be necessary concerning any fact which, according to law and the practice of the court may now be supplied by affidavit, the court may, in its discretion, require such evidence to be presented, wholly or in part, by oral examination of the witnesses in open court, or, before a master in chancery, upon notice to all parties not in default, or their attorneys, and whenever such evidence is presented by oral examination, an adverse party shall have the right to cross examination. This section shall not apply to applications for change of venue."

Under that paragraph the court, in its discretion, could require the facts to be presented by oral examination in open court. Defendant, as agreed by both parties, did make the oral statement set out in his brief. It does not appear whether he was under oath or not. The objection of plaintiff, voiced at the time of the hearing on the motion before the trial judge, was that the verified petition did not set out a meritorious defense. There was no objection to the statement given orally by defendant. The presumption is that the trial court acted properly in the absence of a showing to the contrary. On the showing made defendant had a right to his day in court and it would be unconscionable to allow the judgment to stand.

The order of the Circuit court of Cook county entered January 29, 1937, dismissing the cause for want of prosection and entering a judgment against plaintiff for costs, is affirmed.

ORDER ENTERED JANUARY 29,
1937, AFFIRMED.

Friend, P. J., and Sullivan, J., concur.

[illegible]

[illegible]

section [illegible]

110. [illegible]:

[illegible]

In any [illegible]

any fact [illegible]

may now be [illegible]

require such [illegible]

examination of the [illegible]

chancery, [illegible]

attorney, [illegible]

nation, [illegible]

This section [illegible]

Under that [illegible]

the facts to be [illegible]

defendant, [illegible]

set out in his [illegible]

or not. The [illegible]

hearing in [illegible]

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to the [illegible]

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The [illegible]

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[illegible]

friend, [illegible]

39714

424

ESTHER W. KNORR,
Appellee,

v.

THE GREAT ATLANTIC & PACIFIC TEA COMPANY, a corporation, and OWEN W. COOK,
Appellants.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

297 I.A. 641

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

Esther W. Knorr filed a complaint in the Superior court of Cook county, the first count of which charged defendants with unlawful imprisonment; the second count, with assault and battery; and the third count, with slander. An answer filed for both defendants denied the charges. Prior to the commencement of the trial plaintiff filed an amended complaint and the parties stipulated that the answer on file stand as the answer to the amended complaint. The trial resulted in a general verdict finding defendants guilty and assessing damages in the sum of $1,000. Judgment was entered on the verdict and this appeal brings the case before us for review.

Plaintiff introduced evidence which shows that she, a widow, in company with her married daughter, Ruth Bensing, in the early evening of Saturday, January 5, 1935, went to a store operated as a grocery and meat market by the corporate defendant, at 4755 Lincoln avenue, Chicago; that the store was a self-service store; that she took one of the baskets provided and selected her requirements; that the articles were taken to the counter, weighed and checked, placed in parcels and paid for; that the two women left the store, each carrying a parcel; that the manager of the

store was the individual defendant, Owen W. Cook; that when they had proceeded a short distance from the store a man, later identified as Mr. Walter Cloes, approached plaintiff and told her that the manager wanted to see her; that when she inquired, "What for?" he answered, "For taking goods that you didn't pay for;" that Mr. Cook came running out, took hold of her arm, and said, "You stole some butter," and that in the meantime a crowd had begun to collect; that Cook led her by the right arm through the front door and through the store, which was crowded, to a room in the rear; that she and her daughter were detained in the rear room for a period of between twenty and twenty-five minutes; that the manager stood with his hands against the door leading from the rear room into the store; that he requested the women to pay for the butter; that he said, in answer to their inquiry, that he did not see either one of them take the butter; that he told plaintiff to open her bag, and both women showed him the bags containing the articles purchased; that plaintiff also opened her purse and the manager looked into it; that he told them that if they did not give up the stuff he would call a policeman; that finally the manager told them they could go, and stated that he had made a mistake; that as plaintiff left, in walking through the store she observed that it was well crowded, but she did not know whether she knew any of the people; that she did not return into the store voluntarily; that she did not put any butter in her pocketbook nor did she see her daughter do so, and that she did not steal any butter from the store. Mrs. Bensing, the daughter, corroborated the testimony of her mother. Defendants put the individual defendant, Owen T. Cook, on the stand and, in brief, he related that he was the manager; that Walter Cloes - employed by him and not by the company - had been on the balcony and shortly thereafter came down and followed the women out of the front entrance of the store; that when the witness finished

store [illegible]
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filed [illegible]
the man[illegible]
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Cook came [illegible]
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that he [illegible]
answer [illegible]
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women [illegible]
plaintiff [illegible]
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call a [illegible]
and asked [illegible]
holding [illegible]
but she [illegible]
did not [illegible]
button [illegible]
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put the [illegible]
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employee [illegible]
and shortly [illegible]
the front [illegible]

waiting on a customer he followed Cloes out of the store; that when he got out he was just in time to hear Cloes say, "The manager wants to see you;" that the witness walked up and asked what was the trouble, and plaintiff replied, "I don't know what is the trouble. There is something wrong, and this man stopped me," and the witness said, "Well, if there is any trouble I would like to know what it is;" that Mrs. Bensing said, "Well, let's go back in the store and talk this over;" that both Mr. Cloes and the witness asked plaintiff if she had taken anything and forgotten to pay for it, which she answered in the negative, and that at that time plaintiff suggested that "we go back in the store and talk it over;" that in the meantime the daughter had swung around to come back into the store; that as the daughter swung around Mr. Cloes put his arm up and touched her arm; that the witness led the way back into the store, walking in front of plaintiff, followed by the daughter and Mr. Cloes, and all except Cloes, who remained in the store, proceeded in single file into the back room, where the witness asked the ladies whether they had taken anything without paying for it, to which they replied, "No," and suggested that they look in the bag; that he said, "Now, if you want to show me it is O. K., but I have no right to touch your bag. I am not accusing you of anything. I merely asked you if you forgot to pay for anything;" that the women denied they had taken anything without paying therefor, and the witness said, "Well, if that is true, I am very sorry; it was a mistake. We didn't especially think you had took anything, but I thought possibly you had forgotten to pay for something." The witness denied he had at any time placed a hand on either of the ladies or interfered with their right or ability to enter or leave the store, but that they entered and left of their own free will and accord; denied that he said anything that could be construed to mean that the ladies had taken or stolen any butter or merchandise; denied that he said, "You stole some butter;" denied that at any time

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Mr. [illegible]
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thing. I [illegible]
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it [illegible]
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without [illegible]
ladies or [illegible]
the [illegible]
and [illegible]
to [illegible]
denied [illegible]

Mr. Cloes had his hands upon the person of the plaintiff, and denied that he either led or pushed plaintiff. On cross-examination the witness stated that there were a lot of people on the sidewalk; that the parties did not know any of the people on the sidewalk; that he did not notice whether any of the people stopped; that at the time the women left the store there were between forty and fifty people in the store. Walter Cloes, called by defendants, testified that he was employed and paid by Mr. Cook; that he was upstairs; that he watched the women downstairs; that "they put one quarter of a pound of butter in her pocket book; and then the lady took the shopping bag or the basket, and walked around past the butter box again, and took another quarter of a pound, and put with a quarter of a pound that was in the basket, - with the half pound that was in the basket, pardon me. So they walked around, and the one lady stood at the end of the cracker rack that is right below where I was at, and she held the basket in a way so that the other lady could get the butter, although the women couldn't get hold of it, it seemed, and she had to take it up from underneath of a little groceries that was there, to get it up further on top of the basket so it could be taken hold of; and then that was taken and put into the other lady's pocket-book;" that he came down and walked out to the front of the store and watched while the women shopped; that he followed them out of the store and told them the manager wanted to see them; that they wanted to know why, and he said, "Do you happen to have any butter that you forgot to pay for?" "and they told me I was crazy, and everything else;" that Mr. Cook came up and he talked to them and they decided they would go inside and talk it over inside, in the back; that Mr. Cook took one of the bags because the lady complained it was heavy; that they walked into the back room. On cross-examination the witness stated that when he asked

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them whether they took something they did not pay for they "told me I was crazy, nuts, everything else. * * * They got real sore about it;" that when Mr. Cook asked the women if they had any butter that was not paid for they answered him in the same tone; that there were quite a number of people in the store; that it was ten or fifteen minutes from the time he saw the women take the butter until they had completed their purchases; that he saw each of the women put a quarter pound package of butter in her purse; that he did not know what transpired in the rear room.

Defendants level two criticisms at the judgment. First, that the record does not show that the words and actions of defendants indicate that there was an intention to restrain or that plaintiff was restrained of her liberty; and, second, that the record does not show, so far as the charge of false imprisonment is concerned, that there are circumstances of aggravation which would call for vindictive damages, and that, hence, the recovery, if any, should be confined to the actual injury. No complaint is voiced as to the admission or exclusion of testimony, nor as to the granting or refusal of instructions. We thought fit to recite the salient parts of the testimony somewhat at length because the questions in dispute are largely ones of fact. The brief of defendants is devoted to a defense against the charge of false imprisonment, and ignores the charges of assault and battery and slander. There was no request for a special verdict. There was evidence before the jury to sustain all of the three charges. As has been repeatedly held, when the evidence is conflicting the court will not interfere with the verdict unless it is against the manifest weight of the evidence. The question of liability was clearly one of fact for the jury. In the state of the record we do not feel that we should interfere.

The second point urged is that "in an action of false imprisonment, unless there are circumstances of aggravation which

them whether [illegible]
me I was [illegible]
about it." [illegible]
butter [illegible]
that there [illegible]
was too or [illegible]
the butter [illegible]
each of the [illegible]
purse; that [illegible]

Defendants level

that the record [illegible]
indicate that [illegible]
restrained of her liber[illegible]
so far as the charge [illegible]
are circumstances of [illegible]
damages, and that, [illegible]
to the mental anguish [illegible]
exclusion of evidence [illegible]
instructions. [illegible]
testimony concerning [illegible]
largely done of fact. [illegible]
defense against the [illegible]
charges of assault [illegible]
for a special verdict. [illegible]
ain all of the three [illegible]
the evidence is sufficient [illegible]
erdict unless it is [illegible]
he question of liability [illegible]
he state of the record [illegible]

The second [illegible]
withdrawment, unless [illegible]

would call for vindictive damages, the recovery should be confined to the actual injury." Here again it will be observed that defendants ignore the other two charges. We have no right to assume that the jury, in deciding on the damages, confined their deliberations to the boundaries of the charge of false imprisonment. The jury was the judge of the credibility of the witnesses and the weight to be given to their testimony. Evidently the jury believed plaintiff's witnesses, who recited that plaintiff was unjustly accused of stealing butter, was forced to accompany Cook and Cloes from the sidewalk through the store to a rear room and deprived of her liberty for a period of from twenty to twenty-five minutes. She was accused of being a thief in the presence of numerous people and was subjected to great embarrassment. Cook, according to plaintiff and her daughter, endeavored to persuade plaintiff to admit that she had stolen butter. When accused of the theft outside of the store, in the presence of numerous people, plaintiff protested vehemently, despite which the manager took her by the arm and forced her to accompany him to the rear room of the store. There is abundant evidence from which the jury could find that there was an utter lack of justification for the conduct of Cook and Cloes and the treatment accorded plaintiff. There was evidence which would warrant the jury in believing that Cook persisted in placing her under restraint despite her energetic denials. The jury saw the parties involved in the incident, heard their testimony, observed their demeanor, and had a right to consider whether plaintiff and her daughter were the kind of people who would be likely to steal from the store. It was for the jury to determine whether the actions and words testified about were heard and seen by the people who were on the sidewalk and in the store. There is

would [illegible]
confirmed [illegible]
that [illegible]
to assume that [illegible]
their [illegible]
impressionable. [illegible]
the witness [illegible]
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under [illegible]
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their [illegible]
[illegible]
from the [illegible]
[illegible]
people who [illegible]

nothing in the record to indicate that the jury was swayed by passion or prejudice. We are of the opinion that under all the circumstances as disclosed by the evidence the amount of damages awarded would not justify the court in setting aside the verdict.

The judgment of the Superior court of Cook county should be and is affirmed.

JUDGMENT AFFIRMED.

Friend, P. J., and Sullivan, J., concur.

nothing in the [illegible]
passion or prejudice.
the circumstances [illegible]
damages awarded [illegible]
the verdict.

The judgment [illegible]
should be and is [illegible]

Friend, J. [illegible] dissent [illegible]

39734

STANLEY BAFIA, Administrator of the Estate of MARY TARNOWSKI, Deceased,
Appellee,

v.

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, a corporation,
Appellant.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

297 I.A. 641

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

Plaintiff, as administrator, on April 6, 1935, filed a complaint against The Prudential Insurance Company of America, a corporation, declaring in substance that the company, on July 16, 1933, issued two policies on the life of Mary Tarnowski, who died on March 3, 1934, while the policies were in effect. Defendant filed an answer, to which plaintiff replied, and on a trial by a jury a verdict was returned, on February 18, 1937, against defendant, and damages were assessed at the sum of $1,000, for which amount the court entered judgment.

The applications for the policies are dated July 10, 1933. Mary Tarnowski, in answer to question 17, "What is the present condition of health?" answered, "Good;" in answer to question 17. B., "When last sick? Month. Year." answered "Never;" in answer to question 18, "Does any physical or mental defect or infirmity exist?" answered "No;" and in answer to question 19, "Has life proposed ever suffered from * * * cancer * * *? State what disease?" answered, "No." The applications were not made a part of the policies. The policies, among other things, contained the following: "Preliminary Provision. - This Policy shall not take effect if the Insured die before the date hereof, or if on such

[illegible] Executor of the Estate of [illegible] Deceased,

Appellee,

v.

THE MUTUAL LIFE INSURANCE COMPANY OF AMERICA, a corporation,

Appellant.

No. [illegible]

MR. JUSTICE [illegible]

Plaintiff, [illegible], filed a complaint against the defendant in [illegible] a corporation, [illegible] July 16, 1930, issued a policy [illegible] who died on March 6, 1931, [illegible] Defendant filed an answer, [illegible] trial by a jury a verdict [illegible] against defendant, [illegible] for which amount the court [illegible].

The application for the policy [illegible] Mary Yarnowski, in answer to [illegible] condition of health" [illegible] 17, B., "When last [illegible] answer to question 18, " [illegible] firmity exist." answered "No" [illegible] life proposed ever [illegible] disease?" answered, "No." [illegible] of the policies. The [illegible] following: "If [illegible] effect if the insured [illegible]

date the Insured be not in sound health, but in either event the premiums paid hereon, if any, shall be returned." The policies were issued without medical examination and are what are commonly known as industrial policies.

Defendant first asserts that plaintiff cannot recover because insured was not in sound health at the time the policies were issued, particularly where the company was induced to issue the policies by misrepresentation of material facts made by the applicant in the applications for said policies. Defendant also contends that the trial court erred in refusing to admit hospital records showing treatment of the insured at the Cook County Hospital subsequent to the date of the applications. Finally, defendant maintains that error was committed in refusing to give certain instructions.

The evidence clearly shows that Mrs. Tarnowski was in the Cook County Hospital from April 25, 1933, to April 29, 1933, and that she consented to an operation and treatment and released any claims to the medical and surgical staff of the hospital; that her complaint at the time was a lump in her breast, of seven months' duration, and that for the two weeks preceding April 27, 1933, a certain amount of pain was present. She had a ten months old baby at the time, which she was nursing. Testimony of the witnesses for defendant was that the right breast was about twice as large as the left breast, was slightly movable, very hard. The impression of the doctors was Carcinoma (cancer) of the breast or breast abscess. The daughter of plaintiff testified that she had seen her mother's breasts until the middle of July and did not see any difference in the size. She stated that she did not remember whether her mother had been in the hospital in April or not. Two physicians testified as expert witnesses as to the symptoms and

[illegible]

[illegible] insured

[illegible]

treatment for cancer and answered hypothetical questions. The insurance company sought to show by the records of the Cook County Hospital that the insured was treated there in December, 1933, and operated on for cancer of the breast; that her breast was removed, and that the record showed that the duration of the cancer was one year; and also sought to introduce testimony of a physician who in December, 1933, was an "interne and doctor," who would testify that insured had "a case of sirrhous carcinoma of right breast. One year duration." Surgery: "Case of carcinoma of breast - amputated - large skin defect - infected slightly - carcinoma too extensive." Operation sheet: "House physician, Dr. Arieff." Pathology: "Extensive sirrhous carcinoma of right breast invading chest wall axillary vessels." Technique: "Removal of as much as possible to pectoral Nuenn and axillary vessel. Large skin defect. Redressed with vaseline gauze." The court refused to admit the record or any testimony pertaining to the treatment of the insured subsequent to the date of the application for the policies, on the theory, apparently, that what occurred after the making of the applications would not tend to show any misrepresentations on the part of Mrs. Tarnowski.

Our Supreme court has spoken in unmistakable terms on the proposition in The Western & Southern Life Ins. Co. v. Tomasun, 358 Ill. 496, 502:

> "We thus find the authorities firmly established that it was not necessary to an avoidance of the policy that Mrs. Tomasun should know that her answers were untrue, altho that she did know them to be untrue we can hardly find room to doubt upon the record presented."

This court, in Cross v. The Prudential Ins. Co. of America, 279 Ill. App. 645 (abstract opinion), said:

> "It is a matter of no importance as to whether or not the answers were made with the intention to deceive. The vital question is as to whether the insurance company had a right to rely upon them as true at the time it issued its policy. The

treatment [illegible]

insurance company [illegible]

County Hospital [illegible]

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Dr. Arieff. [illegible]

breast involving [illegible]

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skin defect. [illegible]

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clear, on the theory, [illegible]

of the application [illegible]

on the part of him. [illegible]

Our supreme court [illegible]

proposition in The [illegible]

338 Ill. 480, 482:

"The same [illegible]

was not necessary [illegible]

should know what [illegible]

them to be [illegible]

presented."

This court, in [illegible]

Ill. App. 665 (abstract [illegible]

"It is a matter [illegible]

the premiums were [illegible]

question is as to whether [illegible]

rely upon them [illegible]

questions and answers pertain to material matters and their falsity must have been known to the applicant inasmuch as the application was signed by him and was also made a part of the policy which he subsequently received."

The overwhelming weight of the evidence is that at the time of the applications and at the time of the issuance of the policies Mary Tarnowski was not in good health. We find it difficult to believe that she did not know that her answers to the questions in the applications were untrue. She stated that she had never been sick; yet less than three months before she was in the Cook County Hospital, where her case was diagnosed as cancer. If she had answered that she had been sick the company would have had an opportunity to investigate the facts for the purpose of determining whether to accept her as a risk. There is little doubt that if a representative of defendant had gone to the County Hospital and examined the records and had spoken to the interne, that in the exercise of sound business judgment it would have rejected her applications. In considering the refusal of the trial court to admit the record of the hospital as to the treatment of Mary Tarnowski in December, 1933, and the testimony of the physician on the same matter, we are of the opinion that the record and testimony should have been admitted. The proffered testimony would show that the insured had cancer of the breast in December. The evidence was proper for the jury to consider on the question of whether or not the cancer that defendant claimed existed in December afflicted the woman at the time of her application. The evidence would be material for the jury to consider on the question of whether she was in sound health at the time of making the applications and the issuance of the policies. Certainly such testimony would tend strongly to corroborate the testimony introduced by defendant that Mrs. Tarnowski had cancer in April. If she had

questions and answers [illegible]
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policy which [illegible]."

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time of the [illegible] the time [illegible]
policies Mary Hammond was not in good health. [illegible]
difficult to believe [illegible]
the questions in the [illegible]
she had never been [illegible]
was in the Cook County [illegible]
cancer. If she had [illegible]
would have had an opportunity to [illegible]
purpose of determining [illegible]
is little doubt that [illegible]
the County Hospital and [illegible]
interne. There in the [illegible]
have rejected her [illegible]
trial court to admit the [illegible]
of Mary Hammond [illegible]
action on the same [illegible]
testimony should [illegible]
show that the [illegible]
evidence was proper [illegible]
whether or not [illegible]
afflicted the woman [illegible]
would be material [illegible]
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cancer in April she was not in sound health. Criticism is leveled at the testimony of certain witnesses because they were internes. They were graduate physicians. The weight to be given to the testimony of an interne is governed by the same rules as the weight to be given to the testimony of any other witness.

Defendant complains of the court's refusal to give five instructions. Without discussing the instructions at length we are of the opinion that defendant's refused instructions numbers one, two and three should have been given, and that instructions numbers four and five were properly refused.

For the errors stated and because the judgment is against the weight of the evidence, the judgment of the Superior court of Cook county is reversed and the cause remanded.

JUDGMENT REVERSED AND CAUSE REMANDED.

Friend, P. J., and Sullivan, J., concur.

cannot [illegible]

level [illegible]

more [illegible]

be given [illegible]

rules [illegible]

witness.

[illegible]

five in [illegible]

Length [illegible]

number one [illegible]

situations [illegible]

For [illegible]

the weight [illegible]

Cook County [illegible]

[illegible]

Ryland, [illegible] and [illegible] contract.

40228

EDWARD GAFFNEY,
Appellant,

v.

THE INDEPENDENT ORDER
OF FORESTERS, a corporation,
Appellee.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

297 I.A. 641[3]

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

Defendant filed a motion to strike plaintiff's second amended statement of claim and the Municipal court of Chicago, after due consideration, allowed the motion, whereupon plaintiff elected to stand on his pleading and prosecuted this appeal.

The amended statement of claim reads:

"On or about the Fifteenth day of September, 1896, the Plaintiff, Edward Gaffney, became a member of the Independent Order of Foresters, Court League #477, a corporation organized under the statutes of the Parliament of Canada.

"A policy of insurance entitled, Endowment Certificate #182231, pertaining to the said Plaintiff, was issued by the Independent Order of Foresters on or about the 15th day of September, 1896. Said policy of Insurance provided for the payment to the plaintiff the sum of One Hundred ($100) Dollars upon his reaching his seventieth birthday and also provided for the payment of One Hundred ($100) Dollars upon each birthday reached by the Plaintiff subsequent to his seventieth birthday.

"The said policy also provided that upon proof of the death of the Plaintiff the beneficiary named would receive One Thousand ($1000) Dollars according to the terms thereof. The Plaintiff herein, agreed to pay $1.25 per month as premium upon the policy #182231, the same to become a nullity unless said premiums were paid. The Plaintiff paid each and every premium due thereon to the duly authorized agent of the defendant, until December 1st, 1921.

"The Plaintiff further alleges that on or about the first day of December, 1921, the Plaintiff was informed by the duly authorized agent of the defendant, that new certificates of insurance were to be issued by the defendant and that the Plaintiff was required to turn in his old certificate and in lieu thereof, a new certificate would issue to the said Plaintiff.

EDWARD [illegible],
Appellant,

v.

THE INDEMNITY [illegible]
OF [illegible], a corporation,
Appellee.

MR. JUSTICE [illegible]

Defendant filed a motion to strike [illegible] amended statement of claim [illegible] after due consideration, [illegible] elected to stand on his pleading [illegible].

The amended [illegible]:

"On or about the fifteenth day of [illegible], 1922, the plaintiff, Edward Gaffney, became a member of the Independent Order of Foresters, [illegible] under the statutes of the Dominion of Canada.

"A policy of insurance entitled, [illegible] (18223), pertaining to the [illegible] Independent Order of Foresters on or [illegible] September, 1898. Said policy of insurance [illegible] payment to the plaintiff the sum of One Thousand [illegible] upon his reaching the age of [illegible] the payment of One Hundred ([illegible]) dollars upon [illegible] received by the Plaintiff [illegible].

"The said policy also provides [illegible] death of the Plaintiff the Beneficiary [illegible] Thousand ($1000) dollars [illegible] Plaintiff herein, agreed to pay [illegible] per month [illegible] the policy (18223), the [illegible] premiums were paid. The Plaintiff [illegible] due thereon to the date [illegible] December 1st, 1921.

"The Plaintiff further [illegible] day of December, 1921, the Plaintiff [illegible] authorized agent of the defendant [illegible] sums were to be issued by [illegible] was required to sign in his old [illegible] a new certificate [illegible].

"The duly authorized agent of the defendant at said time represented to the Plaintiff that the certificate to be used in lieu of the surrendered certificate would be issued for one of two different plans, designated as plan one and plan two.

"Plan one, was to be a certificate payable at the expiration of twenty years or at the age of seventy, whichever period was the longer, or payable in the event of the prior death of the insured, the certificate to be a paid-up certificate at the age of seventy. Also that there might be made by the insured cash withdrawals under the terms of the certificate.

"Plan two, was to provide for the payment of the face of the certificate in the event of the death of the insured prior to the age of seventy, and the liability under the certificate to terminate at said time, and providing for the payment of particular premiums to be classified as contributions.

"Plaintiff further alleges that there was a similarity between the certificate to be surrendered and the new one to be issued in that upon the arrival of the seventieth birthday anniversary of the insured, money was to be paid to him.

"That by reason of these similar provisions, this Plaintiff elected to take a certificate to be issued under plan one, and directed the agent of the defendant to prepare the application so that the new certificate would be issued for plan one.

"That this Plaintiff relying on the good faith, truthfulness, and honesty of the representative of the defendant, and believing the representations made to him at said time, executed an application in the manner and form as designated by the said representative, as will more fully appear from a copy of said application hereto attached and made a part hereof.

"That the said representative of said defendant at said time and at the time of execution of said application reported to this plaintiff that a new certificate would thereupon be issued on his life as he applied for under plan one.

"That this Plaintiff received from the defendant a beneficial certificate, a copy of which is hereto attached and made a part hereof.

"That this Plaintiff upon the delivery of said last benefit certificate inquired of the representative of the defendant as to whether the new certificate was the kind that he applied for and desired, and that this Plaintiff at the time of the delivery of said certificate was advised by the agent of the defendant that the certificate then being delivered was under plan one, as set out in the application.

"This Plaintiff further alleges that he is not familiar with insurance laws or insurance usages. That he relied entirely upon the representations and statements made to him by the representative of the defendant, and that he thereupon acted in good faith, relying thereon, and accepted said certificate and

"[illegible]
represented [illegible]
lien of the [illegible]
two different [illegible]

"[illegible]
expiration [illegible]
period [illegible]
death of the [illegible]
at the age of [illegible]
insured [illegible]

"[illegible]
of the certificate [illegible]
prior to the [illegible]
locate to [illegible]
particular premium [illegible]

"[illegible]
between the [illegible]
issued in [illegible]
anniversary of [illegible]

"[illegible]
Plaintiff [illegible]
one, and [illegible]
application [illegible]
plan one.

"[illegible]
fulness, [illegible]
believing the [illegible]
an application [illegible]
representative [illegible]
application [illegible]

"That the [illegible]
time and [illegible]
to this [illegible]
issued on [illegible]

"That this [illegible]
field [illegible]
a part [illegible]

"[illegible]
benefit certificate [illegible]
as to whether the [illegible]
and desired, [illegible]
of such [illegible]
the certificate [illegible]
out in [illegible]

"[illegible]
with insurance [illegible]
upon the representations [illegible]
representative of [illegible]
good faith, [illegible]

promised, and did pay, the monthly contributions designated therein for the entire period of time up to the time that this Plaintiff arrived at the age of seventy years.

"That this Plaintiff was lulled into a sense of security by the said representations of the said representative of the defendant, and did not know that there had not been issued to him such a benefit certificate as he had requested.

"Plaintiff further alleges that an examination of said form of application as attached hereto, clearly designates on the face thereon that after the word plan there was to be designated the figure one or two, but that the said agent inserted therein the word 'term' which appears nowhere either in the application or in the benefit certificate. That all of the typewritten spaces in said application were filled in by the agent of the defendant, and plaintiff was told that the places would be filled to provide for the issuance of a certificate under plan one.

"That the defendant by its said agent perpetrated a fraud and deceit upon this Plaintiff and did not fill in said application as directed, nor did the defendant issue such aninsurance as the Plaintiff believed he had applied for. That the alteration of said application and the issuance of said policy were all predicated on the fraud and deceit perpetrated on this Plaintiff by the defendant and its agent, and the insurance policy or benefit certificate issued thereupon became and was from its very inception a nullity. That this Plaintiff at no time since the application made by him on the 6th day of December, 1921, had a policy of insurance or benefit certificate protecting and covering him under plan one as designated in said application.

"This Plaintiff further alleges that upon the issuance of the new certificate, he was required to pay a higher premium or contribution than he had been required to pay under the original benefit certificate and that by virtue thereof, this Plaintiff was led to believe that the additional premium was for the purpose of securing for him the insurance protection in plan one, designated in said application.

"Plaintiff further alleges that the first notice or actual knowledge he had of the fraud and deceit operated on him by the defendant and its representative was after plaintiff arrived at the age of seventy, when he was informed by the defendant that his insurance had terminated and that they would not accept any further premiums from him, which notice came in the following manner:

"Plaintiff had overlooked the exact date of the arrival at the age of seventy and had received two notices from the defendant in writing on October 11, and November 9, 1934, for additional premiums and paid two monthly installments. That this Plaintiff continued to pay insurance premiums by mistake after he had arrived at his seventieth birthday, and that the defendant accepted the first installment thereof in the sum of $1.97 and did not return the same until he had sent in a second payment of like amount. When the defendant returned both of said payments to the Plaintiff and advised him at said time in writing that he was no longer insured and that his protection had lapsed when he reached the age of seventy and that he was no longer to pay any premiums, that the Plaintiff thereupon returned to the

defendant the check covering said two monthly premiums, and that the defendant has retained the same and continues to retain the same.

"Plaintiff further alleges that he had paid monthly premiums of $1.97 since the first day of December, 1921, in each and every month, up to and including the month of December, 1934.

"That this Plaintiff has demanded of the defendant a return to him of the monies paid by him to it under the fraudulent and deceitful and false representations made to the Plaintiff by the defendant through its authorization.

"That the defendant has refused to re-pay the same together with interest thereon from date of payment to this plaintiff. Plaintiff further alleges that by reason and virtue of the fraudulent, false, and untrue, representations of the defendant through the authorized agent, this Plaintiff has been injured first in the sum of $328.99, the same being the principal amount of premiums by him paid, and the interest thereon to the date of judgment by reason of him having paid said amount to the defendant and said defendant having accepted the same under defendant's false and fraudulent representations to the Plaintiff.

"Wherefore, Plaintiff Demands judgment against the defendant in the sum of One Thousand ($1,000) Dollars."

Defendant urges that the cause is barred by the running of the five years' Statute of Limitations. Plaintiff replies that the operation of the Statute of Limitations was suspended, under the facts of this case, by virtue of section 23, ch. 83, Ill. Rev. Stat. 1937 (sec. 22 Limitations act), which reads:

"If a person liable to an action fraudulently conceals the cause of such action from the knowledge of the person entitled thereto, the action may be commenced at any time within five years after the person entitled to bring the same discovers that he has such cause of action, and not afterwards."

As a second contention defendant argues that there are not sufficient proper allegations in the statement of claim to establish that defendant is guilty of fraud and deceit. A third point urged by defendant is that the contract, not being void ab initio, plaintiff may not recover premiums paid thereunder. Defendant also contends that the pleading does not contain any proper or sufficient averments that would justify plaintiff in his failure to exercise ordinary diligence to discover the alleged fraud.

We, of course, take as true all proper averments of ulti-

defendant the [illegible] policy [illegible], and that the [illegible] the same.

"[illegible] premiums of $1.97 [illegible] and every month, up to [illegible]

"That this [illegible] return to him of the [illegible] and deceitful [illegible] the defendant through [illegible]

"That the [illegible] together with interest thereon from [illegible] Plaintiff further alleges [illegible] lent, false, and untrue, [illegible] the authorized agent, [illegible] sum of $[illegible], the [illegible] him paid, and the interest thereon [illegible] reason of him having paid [illegible] defendant having [illegible] fraudulent representation [illegible]

"Wherefore, plaintiff [illegible] judgment [illegible] the defendant in the sum of [illegible] ($[illegible]) [illegible]."

Defendant [illegible] of the five years' [illegible] the operation of the [illegible] the facts of this case, by [illegible] Stat. 1927 ([illegible]

"If a person [illegible] the cause of such action from [illegible] thereto, the action may [illegible] after the person entitled to bring [illegible] such cause of action, [illegible]

As a [illegible] sufficient proof [illegible] that defend[illegible] by defendant in [illegible] may not recover premium [illegible] that the pleading does not [illegible] merits that would [illegible] ordinary diligence [illegible]

se, of course, [illegible] of [illegible]

mate facts. In a charge of fraud and deceit plaintiff is required to set out ultimate facts which establish the elements of fraud. These are, quoting from Billstrom v. The Triple Tread Tire Co., 220 Ill. App. 550:

> "1. That the representations as charged in the declaration were made by the defendants, or one of them. 2. That the representations were false and known to be false by the defendant making them, or made as a positive assertion recklessly without any knowledge of its truth, and such representations must be made to deceive the plaintiff. 3. That the plaintiff believed the representations to be true. 4. That the plaintiff making the purchase or entering into the contract relied upon the representations and was induced to make the purchase or enter into the contract because of the same. 5. That the plaintiff has suffered damage thereby."

Plaintiff, in his argument, goes outside of the record, and wherever that is done we must disregard the same. From a careful reading of the amended statement of claim and disregarding conclusions therein, we find that there are no averments that the representations claimed were known to be false by defendant, or that a positive assertion was made recklessly without any knowledge of its truth and made to deceive plaintiff.

We address ourselves now to the question as to whether the section quoted from the Statute of Limitations, under the facts alleged, permits plaintiff to maintain his action even though it would otherwise be barred by the five years period of limitation. The parties agree that to come within the statute plaintiff must establish that defendant has been guilty of affirmative acts of concealment of the cause of action. Virtually the same facts that constituted the fraud and deceit are the basis for the claim that there was an affirmative concealment of the cause of action. From a reading of the pleadings it is quite plain that there was no affirmative concealment of the cause of action by defendant. Plaintiff quotes the case of Keithley v. Mutual Life Ins. Co., 271 Ill. 584, 595, on the proposition that "the existence of a fiduciary relation making it the duty of the person committing the fraud

to disclose the true nature of the transaction to the person defrauded may excuse the latter from the use of ordinary diligence to discover the fraud." Plaintiff's brief states that he and defendant's agent were both members of the same lodge and that plaintiff naturally relied upon the officer of his lodge, whom he had known for many years. That statement is not found in the pleading and there is no allegation in the pleading from which the court could infer that a fiduciary relationship existed. We are of the opinion that the statement of claim does not show that plaintiff exercised ordinary diligence to discover the alleged fraud.

We have examined the cases cited in support of the proposition advanced by plaintiff to the effect that in an action for fraud and deceit in relation to an insurance contract the plaintiff may recover the premiums paid thereon where it is shown that the contract was void ab initio. It is obvious that the contract in question here, if fraud tainted the transaction, was only voidable, at the option of the one who claims he was defrauded. The contract of insurance was in full force and effect, and had the insured died before he reached the age of seventy years the full amount of the policy could be collected. The cases cited by plaintiff do not support his theory of recovery of premiums paid under the facts set out in the statement of claim.

A motion of defendant to dismiss the instant appeal was reserved to hearing. As it is without merit it is denied.

The trial court was right in striking the amended statement of claim and the order will be affirmed.

ORDER AFFIRMED.

Friend, P. J., and Sullivan, J., concur.

to disclose [illegible] the [illegible]
fraudent may assume the [illegible] [illegible] are
to discover the fraud [illegible]
defendants [illegible]
plaintiff [illegible]
he had known for many [illegible]
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court could infer [illegible]
of the opinion that [illegible]
plaintiff exercised [illegible]
fraud.

We have [illegible]
condition advanced by [illegible]
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tiff may recover [illegible]
the contract [illegible]
in question here, [illegible]
voidable, or the [illegible]
The contract of insurance [illegible]
the insured died before [illegible]
full amount of the policy [illegible]
by plaintiff do not [illegible]
paid under the [illegible]

A motion of [illegible]
reserved to hearing [illegible]

The trial court [illegible]
more of claim and the order will be [illegible]

Ryland, J., and Williams, J., concur.

39247

CHICAGO WOOD AND COAL COMPANY,
a corporation,
Appellant,

v.

CITY OF CHICAGO,
Appellee.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

297 I.A. 641

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

Plaintiff, Chicago Wood and Coal Company, filed its declaration October 13, 1933, in an action to recover interest on a judgment for $37,519 rendered in the County court of Cook county, February 16, 1922, under section 22 of the Local Improvements act (Cahill's Ill. Rev. Stats., 1933, chap. 24, par. 155), against defendant, City of Chicago, the principal amount of which judgment was paid on March 29, 1923. The interest claimed by plaintiff from February 16, 1922, the date of entry of the judgment, to March 29, 1923, the date of the payment of same, amounted to $2,103. The trial court entered judgment in favor of defendant and against plaintiff on the latter's claim for interest. This appeal seeks to reverse said judgment.

Defendant interposed several pleas to plaintiff's declaration, the only one of which it is necessary to consider is its plea that plaintiff's alleged cause of action is barred by the Statute of Limitations since it did not accrue within five years before the commencement of this suit October 13, 1933.

The precise question presented here was decided by our Supreme court in the recent case of Blakeslee's Storage Warehouses et al. v. City of Chicago, 369 Ill. 480 (advance sheets), under

a practically identical factual situation, where the court said commencing on page 481:

"Appellant's intestate was awarded $58,152 in a special assessment proceeding for land taken, and judgment was entered in her favor for that amount February 16, 1926. After deducting $3,598 for benefits, the net judgment amounted to $54,554. This amount was paid October 28, 1926. More than five years afterwards, to-wit, December 5, 1934, this suit was brought in the circuit court of Cook county against appellee for interest on the full amount of the award from February 16, 1926, to the date when payment was made ***. The trial court entered a judgment for interest on $54,554 from February 16, 1926, to October 28, 1926, in the sum of $1,909.24. *** The City of Chicago appealed to the Appellate Court. That court held that whatever claim for interest plaintiff had was barred by the statute of limitations. The judgment was reversed and the cause is here on leave to appeal.

"Appellant's contentions are that interest on a judgment is a part of it; that a judgment cannot be satisfied unless the face of the judgment, interests and costs are paid; that this proceeding is a cause of action based upon a judgment, and that such an action is barred only by the twenty-years' statute of limitations. On the other hand, appellee contends that appellant's claim is solely for interest; that it is purely of statutory origin, and is not a part of the judgment, and comes within the purview of 'all civil actions not otherwise provided for' and is barred by the five-years' limitation in section 15 of the statute of limitations. ***

"In determining whether interest on a judgment is a part of it, the character of a judgment and the authority for imposing interest are important factors to be considered. A judgment is the sentence of the law pronounced by the court upon the matter contained in the record. (3 Blackstone's Com. 395.) It is the law's last word in a judicial controversy and may be defined as the final consideration and determination of a court upon matters submitted to it in an action or proceeding. (15 R. C. L., Judgments, 569.) A judgment is the judicial act of the court. (Dorman v. Usbe Building and Loan Ass'n, 115 N. J. L. 337, 180 Atl. 413.) On the other hand, the right to interest apart from contract, such as interest on a judgment, does not emanate from the controversy, or from the judgment, or from anything of a judicial nature. At common law, interest could be recovered in no case except where there was an express agreement therefor. Because of losses occasioned by delay in the payment of final judgments the legislature provided a remedy for such losses by way of interest thereon as fair compensation for such delays. The remedy is found in section 3 of the Interest act. The recovery of interest in this State, not contracted for, finds its only authority in the statute. It is purely statutory. Blaine v. City of Chicago, *** [366 Ill. 341]; Feldman v. City of Chicago, 363 Ill. 247; Turk v. City of Chicago, 352 id. 171.

"Section 3 of the Interest act, (Ill. Rev. tat. 1937, chap. 74, par. 3) provides: 'Judgments recovered before any court or magistrate shall draw interest at the rate of five (5) per centum per annum from the date of the same until satisfied. When judgment is entered upon any award, report or verdict, interest shall be computed at the rate aforesaid, from the time when made or rendered to the time

of rendering judgment upon the same, and made a part of the judgment.' It is to be observed that two classes of interest are contemplated by the statute, - i.e., that which accrues prior to judgment, and interest which accrues after the judgment is entered. Interest accruing before judgment is expressly made a part of the judgment, but no such provision is made as to interest accruing on a judgment after it is entered. It is a cardinal rule of statutory construction that the expression of one thing or one mode of action in a statute excludes other things or modes though not expressly prohibited. (People v. Wiersema State Bank, 361 Ill. 75; Sammis v. Clark, 13 id. 544.) That rule is applicable here, and excludes interest on a judgment as a part thereof. Furthermore, it is obvious that at the time the judgment was entered there was no interest due. Hence, the subsequently accruing interest, recoverable by virtue of the statute, could not be a part of the judgment when it was entered. How the interest could afterward modify the judgment by increasing it in amount is not suggested, and no logical interpretation of the law can reach any such result. A judgment stands in amount as it is entered, and the only way in which it may be modified is by a direct proceeding for that purpose. Interest on a judgment is to be distinguished from costs in a proceeding, for which judgment is entered as a part of the principal judgment in the cause. The conclusion is inescapable that interest on a judgment is not a part of it. It is further to be noticed that, under the distinction between the two classes of interest mentioned in section 3 of the Interest act, the interest on the judgment cannot be considered a part of the value of the land taken, for which the judgment was entered. (Blaine v. City of Chicago, supra.) Therefore, if appellant is entitled to interest on the judgment it is not by virtue of the judgment or the judicial proceeding culminating therein, but arises solely under the provisions of the statute. (Turk v. City of Chicago, supra.)

"The right to interest under the statute on a condemnation judgment is well settled. (Blaine v. City of Chicago, supra; Feldman v. City of Chicago, supra; Turk v. City of Chicago, supra; Girard Trust Co. v. United States, 270 U. S. 163, 70 L. ed. 524.) But in each of those cases the question of the statute of limitations was not in issue. The section of the statute of limitations relied upon by appellant, (Ill. Rev. Stat. 1937, chap. 83, par. 26,) authorizing an action upon a judgment within twenty years next after the date of such judgment, manifestly has no application here. The action in this case is not upon the judgment. It has been paid. The claim is for interest which is solely of statutory origin.

"Section 15 of the Statute of Limitations provides that actions on unwritten contracts, awards of arbitrators, or to recover damages for injury to property, or to recover possession of or damages for the detention or conversion of personal property 'and all civil actions not otherwise provided for, shall be commenced within five years next after the cause of action accrued.' We do not agree with appellant that the doctrine of ejusdem generis excludes this action from the terms of the statute. In Ambler v. Whipple, 139 Ill. 311, the statute was held to bar an action on a foreign judgment instituted more than five years after the judgment was entered. In Woolverton v. Taylor, 132 Ill. 197, it was applied to an action brought after the limitation period to recover on the statutory liability of corporate directors for allowing the corporate indebtedness to exceed the amount of its capital stock, and in Parmelee v. Price, 208 Ill. 544, applied to an action to recover un-

[illegible]

paid subscriptions to the capital stock of a corporation. An action to recover interest on a judgment falls within the term 'All civil actions not otherwise provided for.' The Appellate Court correctly held the action is barred by section 15 of the Statute of Limitations."

The judgment of the Superior court is affirmed.

JUDGMENT AFFIRMED.

Friend, P. J., and Burke, J., concur.

[illegible]

The judgment of the [illegible] court [illegible]

JUDGMENT [illegible]

Friend, J. J., and Duff, J., concur.

40048

46A

RUTH WALKER SEWELL,
Appellee,

v.

ARTHUR SEWELL,
Appellant.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

297 I.A. 642

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This appeal, which was consolidated for hearing in this court with case No. 40013, seeks to reverse an order entered December 28, 1937, directing Arthur Sewell, defendant, to pay Ruth Walker Sewell $250 attorney's fees, $50 for briefs and $10 appearance fee to defend the appeal prosecuted by defendant in said case No. 40013 and also to reverse an order entered February 4, 1938, finding defendant guilty of contempt for failure to comply with the order of December 28, 1937, and committing him to the county jail for such contempt.

We have this day filed an opinion in case No. 40013 and the conclusions reached therein on the facts as they appeared in that case are controlling as to the reasonableness of the allowances made to plaintiff to defend against the appeal from her decree and the order committing defendant to the county jail for his failure to make the payments for her support and solicitor's fees as ordered by said decree.

The only other question presented is whether the trial court has authority in an action for separate maintenance, where an appeal is prosecuted by the husband from a decree granted to the wife, to allow her suit money and attorney's fees with which to defend her decree against such appeal. Defendant insists that, while

40048

RUTH [illegible],
Appellee,

v.

ARTHUR [illegible],
Appellant.

MR. JUSTICE [illegible]

This [illegible]
this court [illegible]
entered December [illegible]
to pay Ruth [illegible]
and $10 [illegible]
ant in said [illegible]
February [illegible]
to comply [illegible]
to the court [illegible]

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the complaint [illegible]
that [illegible]
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decree [illegible]
his [illegible]
[illegible] as [illegible]

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[illegible]
appeal is [illegible]
to [illegible]
her [illegible]

the Divorce act specifically authorizes the allowance of suit money and attorney fees to defend against an appeal from a decree or order for the payment of alimony, there is no provision in the statute pertaining to separate maintenance which permits an allowance for defending against an appeal from a decree or order entered in a proceeding for separate maintenance, and he further insists that the chancellor erred when he allowed plaintiff the amounts heretofore shown to defend against defendant's appeal from her decree and the subsequent order entered committing defendant to the county jail for his failure to comply with the terms of said decree. In passing upon the authority of the court to grant money to a wife to defend an appeal taken by her husband in a suit for separate maintenance in Earl v. Earl, 75 Ill. App. 351, at pp. 351, 352, this court said:

"By this statement, if not as well by the assignment of errors, the consideration of this writ of error is limited to the following order of April 4, 1895:

"'And this cause coming on to be heard on motion of complainant for solicitor's fees for defending the appeal of defendant, John G. Earle, to the Appellate Court of the First District of the State of Illinois, from the order of this court made heretofore herein for payment of alimony pendente lite, suit money and solicitor's fees, and the court having heard the evidence and the argument of counsel, and being fully advised in the premises, doth order, adjudge and decree that the defendant, John G. Earle, pay to the complainant the sum of two hundred and fifty dollars ($250) as her solicitor's fees in her defense in said appeal, and that the same be paid to the complainant or to her solicitor on or before the 11th day of April, A. D. 1895.'

"We are unable to see how any question can arise as to the power of the court to thus provide the wife with means necessary to prosecute her cause. Section 22, Chapter 68, Revised Statutes; Section 15, Chapter 40, Revised Statutes; Razor v. Razor, 42 Ill. App. 504; Blake v. Blake, 80 Ill. 523."

In considering the same matter in the People ex rel. v. Circuit Court of Cook County, 169 Ill. 201, the court said at pp. 213, 214:

"The question then is: in a suit for separate maintenance, where an order for temporary alimony and for suit money and solicitor's fees is entered and appealed from, can the lower

the [illegible]

money [illegible]

or cr[illegible]

statute [illegible]

ence for [illegible]

in a pro[illegible]

that the other [illegible]

heretofore [illegible]

decree [illegible]

the county [illegible]

decree. [illegible]

to a [illegible]

separate [illegible] in [illegible]

311, 358, the [illegible]

"By [illegible]

error, the [illegible]

the foll[illegible]

"[illegible]

complaint [illegible]

defendant [illegible]

District of [illegible]

made [illegible]

and money and [illegible]

evidence [illegible]

in the [illegible]

defendant [illegible]

murder [illegible]

defense [illegible]

plaintiff or [illegible]

[illegible] 1898.'

[illegible]

the power of [illegible]

necessary to [illegible]

[illegible]

Hanson v. [illegible]

[illegible]

[illegible] point of [illegible]

pp. 311, 314:

"The [illegible]

tence, where [illegible]

and [illegible]

court enter further orders, granting money to the wife to defend the appeal taken by her husband, and granting her alimony to be applied pro tanto upon the order for temporary alimony appealed from in case of the final affirmance of the latter order?

"This will depend upon the construction of the statute. Section 15 of the Divorce act is as follows: 'In all cases of divorce the court may require the husband to pay to the wife, or pay into court for her use during the pendency of the suit, such sum or sums of money as may enable her to maintain or defend the suit; and in every suit for divorce the wife, when it is just and equitable, shall be entitled to alimony during the pendency of the suit. And in case of appeal or writ of error by the husband, the court in which the decree or order is rendered, may grant and enforce the payment of such money for her defense, and such equitable alimony during the pendency of the appeal or writ of error, as to such court shall seem reasonable and proper.' (1 Starr & Curtis'sStat. p. 890.) The act in regard to separate maintenance provides, that 'the court may grant alimony to enable the wife to prosecute her suit as in cases of divorce.' (1 Starr & Curtis' Stat. p. 1281.) This court has held that, in a bill for separate maintenance, the circuit court has power to grant temporary alimony, and that the provisions of the Divorce act in regard to suit money and to temporary alimony, as embodied in section 15 above quoted, apply equally to suits brought for separate maintenance and to suits brought for divorce. ***

"An appeal or writ of error from a final decree of divorce, or from a final decree in a separate maintenance suit, does not deprive the wife of the right in the court below to an allowance for her defense, and to such equitable alimony as shall seem reasonable and proper even during the pendency of the appeal or writ of error."

In defendant's brief it is stated that "we anticipate that we will have to meet the argument that if the defendant can procure money to appeal, he should also be able to procure money for defense." This is a very pertinent observation. He should provide the money for plaintiff's defense to his appeal so long as he has the means to prosecute same.

Inasmuch as the allowance to plaintiff of suit money and attorney's fees for her defense against defendant's appeal in case No. 40013 was reasonable and defendant willfully refused to comply with such order, the orders of the Superior court of December 28, 1937 and February 4, 1938, are affirmed.

ORDERS AFFIRMED.

Friend, P. J., and Burke, J., concur.

[illegible]

"While [illegible] Section 32 of the [illegible] follows: [illegible] divorce the court may require [illegible] or pay into court for [illegible] such sum or sums of money [illegible] the suit; and in every such [illegible] and equitable, [illegible] of the suit. [illegible] bond, the court in [illegible] grant and an order [illegible] such equitable [illegible] of error, [illegible] (1 Stern's Supplemental Set, § 30.) [illegible] maintenance provides, [illegible] the wife to prosecute [illegible] & Curtis' Set, p. 1[illegible]) [illegible] separate maintenance, the [illegible] alimony, and that the provision [illegible] money [illegible] alimony [illegible] quoted, [illegible] to suits brought to divorce.

"An appeal [illegible] or from a final decree [illegible] deprive the wife of [illegible] for her defense, [illegible] able and proper [illegible] error."

In defense [illegible] we will have to meet [illegible] money to spend, [illegible] money for defense." This is a very peculiar [illegible] money for plaintiff's defense [illegible] to prosecute same.

Inasmuch as [illegible] attorney's fees for [illegible] to $300, was [illegible] with which order, [illegible] 1907 and February [illegible]

[illegible]

40068

REALTY MANAGEMENT COMPANY,
a corporation,
Appellant,

v.

LOUIS MEDOW,
Appellee.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

297 I.A. 642

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

Plaintiff, Realty Management Company, had a judgment by confession for $410 entered September 11, 1936, against defendant, Louis Medow, under a warrant of attorney contained in a written lease alleged to have been entered into March 13, 1931, between plaintiff as lessor and defendant as lessee. The lease covered an apartment in a building at 4936 North Harding avenue, Chicago, for the term commencing May 1, 1931, and terminating April 30, 1932. The amount of the judgment represents past due and unpaid rent for the months of October, November and December, 1931, and January, February, March and April, 1932, at $50 a month, and $60 attorneys' fees, as provided in said lease. After a hearing on defendant's petition to vacate the confessed judgment and plaintiff's amended answer thereto an order was entered January 10, 1938, sustaining defendant's motion to vacate said judgment by confession, finding the issues against plaintiff and rendering judgment against it for costs. This appeal is prosecuted to reverse the judgment order of January 10, 1938.

Defendant's petition, filed December 23, 1937, to vacate the judgment entered by confession on September 11, 1936, alleged in substance that he was first apprised on November 28, 1937, of

[illegible]
a corpor[illegible]

v.

LOUIS [illegible]

MR. [illegible]

[illegible]
consideration of [illegible]
Louis Rev[illegible]
Issue alleged [illegible]
plaintiff [illegible]
an apartment in [illegible]
for the [illegible]
1932. The [illegible]
rent for [illegible]
January, February, [illegible]
attorney's fees, [illegible]
defendants' [illegible]
title [illegible]
[illegible]
finding the [illegible]
it for [illegible]
order of January [illegible]
[illegible]
the [illegible]
in [illegible]

the rendition of said judgment by confession when his wife informed him of the service of an execution upon her on November 22, 1937; that he did not execute the lease; that the signature of the lessee thereon purporting to be his was not in fact his signature; that, therefore, the warrant of attorney contained in the lease was void; and that the court was without jurisdiction to enter the judgment by confession. Defendant was granted leave to appear and defend, the judgment to stand as security and his petition to vacate to stand as his affidavit of merits.

Plaintiff's amended answer to defendant's petition to vacate averred substantially that said petition was insufficient in that it failed to allege that Medow did not authorize anyone to execute the lease for him and that it failed to allege that he did not ratify and confirm "the signing of his name to said lease by someone else;" that shortly prior to March 13, 1931, defendant applied to plaintiff for a lease of the premises in question; that plaintiff "prepared and presented to the said Louis Medow the lease upon which judgment was heretofore entered herein for his signature, said lease including among its terms the power of attorney therein set forth;" that "Medow returned the said lease with his name appended thereto and thereafter entered into possession of the premises described in said lease and occupied said premises under said lease" until on or about March 31, 1932; that "Medow failed to pay the rent for said premises for the last seven months of the term of said lease;" that "judgment was entered by confession herein on * * * September 11th, 1936;" that "an execution duly issued therein, which execution was returned by the Bailiff of this court 'no property found;'" that, "thereafter garnishment proceedings were instituted upon said judgment and said execution against * * * Louis Medow and the Nortown Food Mart * * *

the rendition of [illegible]
him of the [illegible]
that he did not [illegible]
thereon, [illegible]
therefore, [illegible]
and that the [illegible]
by confession, [illegible]
the judgment [illegible]
stand as his [illegible]

Finally, [illegible]
averred under [illegible]
it failed to [illegible]
the lease for [illegible]
and confirm "th[illegible]
that shortly prior [illegible]
for a lease of [illegible]
and presented [illegible]
was heretofore [illegible]
ing upon the [illegible]
"Widow [illegible]
thereafter, [illegible]
lease and occupy[illegible]
March 17, 1924; [illegible]
for the last seven [illegible]
was endorsed by [illegible]
"an accretion [illegible]
the Delaware [illegible]
permanent [illegible]
accretion [illegible]

and that on September 25th, 1936, a wage demand based upon said judgment was personally served upon * * * defendant * * * and upon said employer, the Nortown Food Mart * * * as provided by Section 14 of the garnishment act;" that the garnishee was discharged because its books disclosed that nothing was due to Medow "at the time of the garnishment;" that on November 22, 1937, an alias execution issued and was served upon the defendant; that on November 29, 1937, Medow "filed in this cause his schedule claiming his statutory exemption under said judgment and execution;" that "thereafter the plaintiff caused a levy to be made upon the said execution" on December 22, 1937; and that on December 24, 1937, Medow filed his petition to vacate the judgment by confession.

Plaintiff's answer also alleged that "it has no knowledge as to whether or not the signature appearing on the lease * * * is a true and genuine signature of * * * Medow and therefore neither admits nor denies the genuineness of such signature and * * * states that because of the fact that the said lease was presented by said defendant to plaintiff bearing the alleged signature of the defendant * * * and the fact that * * * Medow entered into possession of and occupied said premises under and by virtue of said lease and paid part of the rental for said premises and because of the fact that * * * Medow, had knowledge of said judgment against him on * * * September 25th, 1936, when said wage demand was served upon him * * * and the further fact that he filed his schedule herein thereby ratifying and affirming the validity and legality of the judgment entered against him as aforesaid and thereby causing the plaintiff to order a levy and incur the costs and expenses therein and that no motion to vacate and set aside the said judgment was made until * * * December 24, 1937, the said Louis Medow, is estopped from denying and questioning the genuineness of the sig-

nature attached to the lease."

It is, of course, the law that if one's name is affixed without his authority as the lessee to a lease which contains therein a warrant of attorney, and if said purported signature is not subsequently ratified by him, the lease is a nullity and any judgment confessed upon a warrant of attorney included within its terms, is absolutely void and may be vacated at any time. But what is the situation presented here? Defendant failed to pay the rent specified in the lease for the last seven months of its term and it is admitted that he and his family occupied the premises the major portion of that time. After much hedging on cross-examination he finally admitted that his name was written on the lease as lessee by his wife. The rent was paid by him for the first five months of the term of the lease. Medow had occupied the same premises for about two years prior to said term under a written lease. Simon Brown, plaintiff's agent, testified: "I renewed this lease with Mr. Medow * * * I went to see Mr. Medow about renewing this when it was about three months before the expiration of the former lease, and we had agreed on a price, and I went back to the office and made up a requisition to have the lease drawn, and I took it back to the apartment and gave it to Mr. Medow * * * he said he didn't want to sign it then but he wanted to look it over first * * * he wanted me to call for it the next day and I picked it up the next morning from Mrs. Medow * * * that was the same lease I had delivered to Mr. Medow the day before." While defendant testified that he was not "presented with a lease to sign," that "I suppose my wife was" and that "nobody has the right to sign my name," he made no specific denial of the facts and circumstances under which the lease was delivered to him and signed as related by the witness Brown.

nature [illegible] on the lease."

It is, of course, [illegible] filed without his [illegible] for [illegible] therein [illegible] is not subsequently [illegible] any judgment [illegible] its terms, in [illegible] But what is the [illegible] the term specified in the [illegible] term and it is [illegible] the major portion [illegible] mation he [illegible] as leases by [illegible] months of the [illegible] promises for [illegible] lease. Upon [illegible] lease with me, [illegible] this when [illegible] former lease, [illegible] office and made [illegible] took it back [illegible] said he didn't want [illegible] first [illegible] it up [illegible] hence I had [illegible] are justified [illegible] that I suppose [illegible] sign my name, [illegible] stances under which the [illegible] as related by the [illegible].

The judgment by confession, as heretofore shown, was entered September 11, 1936. Aaron M. Strause testified in plaintiff's behalf that on September 25, 1936, two weeks after the entry of said judgment, he personally served defendant with a garnishment demand as provided by statute. When the affidavit of the witness, executed September 28, 1936, as to the service of such demand upon defendant, was offered in evidence, it was improperly excluded. This affidavit executed just three days after the service of the demand and made a part of the record in this cause, in our opinion shows conclusively that defendant was apprised of the entry of the judgment by confession exactly two weeks after the date of its rendition, despite his denial of the service of such garnishment demand upon him. Yet he took no steps to have the judgment vacated at that time nor did he until approximately fifteen months later. Then, after the alias execution issued and was served upon him by delivering a copy of same to his wife November 22, 1937, of which service he claims he was not advised until November 28, 1937, defendant filed a schedule listing certain personal property which he claimed was exempt from execution. This schedule was also erroneously excluded from the evidence. The filing of the schedule was important and material in that it was indicative of defendant's recognition of the validity of the judgment fifteen months after its entry.

It clearly appears that, even though defendant did not personally affix his signature to the lease as lessee, he not only authorized his wife to sign his name thereon but by his subsequent conduct he ratified the lease as executed, including the warrant of attorney contained therein. In our opinion, his motion to vacate the judgment by confession was merely an afterthought.

The court hearing the cause on leave granted to defend adopted the erroneous theory advanced by defendant that the only

issue to be determined was whether or not defendant personally placed his signature upon the lease. That issue, although raised, became immaterial upon a proper consideration of the competent evidence introduced by plaintiff and that which was offered in its behalf on the hearing but rejected. This evidence, as hereinbefore stated, showed not only the authority of defendant's wife to sign his name on the lease but that he ratified her act in so doing. It is well to point out that it is the established law that where a motion is made to vacate a judgment by confession and leave is granted to appear and defend with the judgment ordered to stand as security, the cause proceeds to trial on the merits as though the judgment had not been confessed but the suit had been instituted by the issuance of summons. The trial court did not follow this procedure. In Baragwanath v. Lasher, 203 Ill. 247, the court said at p. 249:

"Courts of law have jurisdiction to entertain and determine motions to vacate judgments entered by confession. In considering and deciding such motions equitable jurisdiction is exercised and equitable principles are applied. A motion of this kind will be granted if equitable reasons are made to appear for so doing. It is competent for the court, on the hearing of such a motion, if the showing be doubtful, to decline to vacate the judgment but to open up the judgment and allow the defendant to plead to the declaration, and thus preserve the lien of the judgment originally entered for the security of the plaintiff in the action. The issues raised by pleas filed under an order so opening a judgment are issues in the original action at law, and the jurisdiction exercised by the court in the disposition of such issues, and the entering of judgment thereon, is legal and not equitable, and legal, not equitable, principles of law are to be applied in the decision of such issues. The proceeding is not converted into a suit in chancery by the motion to vacate or open up the judgment merely because in deciding that motion the court acts upon equitable principles. The proceeding is the original action at law."

To the same effect is Western Cold Storage Co. v. Keeshin, 252 Ill. 165, where it was said at p. 167:

"It is quite evident that, when the court by its order of May 24 sustained defendant Keeshin's motion to vacate the judgment and to permit him to make a defense to the suit, and plaintiff was given leave to file an amended statement of claim, the cause then stood as the ordinary case which is proceeding to a trial."

That defendant authorized and ratified the act of his wife

[illegible] leave to be [illegible]

[illegible] placed in [illegible] time upon [illegible] motion, [illegible] became immaterial upon [illegible] or the material evidence introduced by [illegible] in the [illegible] behalf on the hearing [illegible] stated, showed not only [illegible] his name on the [illegible] is well to point out [illegible] motion is made to vacate [illegible] granted to appear and [illegible] security, the court proceeds [illegible] judgment has not been [illegible] by the issuance of summons. [illegible] cedure. In Bergemann v. [illegible], [illegible] p. 245:

"Courts of law have jurisdiction to [illegible] motions to vacate judgments [illegible] and deciding such motions [illegible] equitable principles [illegible] granted if equitable [illegible] is competent for the court [illegible] the showing be doubtful, [illegible] open up the judgment [illegible] declaration, and then [illegible] entered for the security of the [illegible] issues raised by plaintiff [illegible] are issues in the original action [illegible] exercised by the court in the [illegible] entering, or in vacating [illegible] not equitable, principally [illegible] of such issues. The [illegible] chancery by the motion [illegible] because in deciding these [illegible] principles. The proceeding [illegible]."

To the same effect [illegible] 168, where it was held [illegible]

"It is [illegible] May be [illegible] and to permit him to [illegible] given leave to file [illegible] stone [illegible]

That notwithstanding [illegible]

in signing his name to the lease is confirmed by his delay, with knowledge of its entry, in moving to vacate the judgment. He admits that pursuant to the lease signed by his wife in his name, he occupied the apartment, paid rent for a portion of the term at the rate specified in the lease and still owes rent for the balance of such term. It would be preposterous and a rank denial of justice to hold under the facts and circumstances of this case that merely because he did not personally place his signature on the lease, defendant could evade his obligation to plaintiff to pay the rent due under the lease.

We have carefully read and considered the authorities cited by defendant but inasmuch as they are inapplicable to the facts in this case, we deem it unnecessary to discuss them.

For the reasons stated herein the order of the Municipal court of Chicago of January 10, 1938, which vacated the judgment by confession for $410 and costs entered September 11, 1936, and which rendered judgment in favor of defendant and against plaintiff for costs is reversed and the cause remanded with directions to deny defendant's motion to vacate and to confirm the judgment by confession rendered against defendant September 11, 1936.

JUDGMENT REVERSED AND CAUSE REMANDED
WITH DIRECTIONS.

Friend, P. J., and Burke, J., concur.

40170

LOUIS A. SMITH,
Appellee,

vs.

ROY HEFTER,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

48A

297 I.A. 642

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Plaintiff, an attorney, brought suit against a former client alleging that he had agreed to represent him in a divorce proceeding for a total fee of $200 if the suit was contested; that defendant paid plaintiff $35 on account and the proceedings were instituted; that without fault on plaintiff's part defendant procured the services of another attorney, who was successful in obtaining a divorce for defendant; plaintiff says he appeared in court on different occasions representing defendant and has received nothing from him except the $35 mentioned; he asked that defendant be required to pay him $165, the balance of the amount agreed upon.

Defendant answered that plaintiff agreed to represent him for $100 and that he paid him on account $50; that plaintiff deserted the defendant when the divorce case was called for hearing, and defendant was compelled to secure the services of another attorney; defendant filed a counterclaim asking for the return of the $50. The jury found for plaintiff with $150 damages and defendant appeals from the judgment for this amount. Plaintiff does not appear in this court.

Upon the trial before a jury plaintiff acted as attorney pro se. He also testified as a witness as to matters communicated to him by the defendant, who was seeking his advice as to the possibility of obtaining a divorce. Over objection of counsel he was permitted to testify that defendant had told him of various acts

of misconduct on his own part; that defendant had related to him his adulterous connection with another woman; the plaintiff witness related at some length communications made to him by defendant touching the proposed divorce and which tended to reflect on defendant, all of which was objected to as being privileged communications. Such testimony should have been excluded. Also much irrelevant testimony was permitted.

Professional communications between attorney and client are privileged communications which the law on the ground of public policy excludes for the reason that greater mischiefs would result from permitting their admission than from rejecting them. The People v. Marcofsky, 219 Ill. App., 230, 232; The People ex rel. Shufeldt v. Barker, 56 Ill. 299; Thorp v. Goewey, 85 Ill. 611; Dickerson v. Dickerson, 322 Ill. 492.

Plaintiff argued the case to the jury and in his argument denounced defendant and charged him with conduct about which there was no testimony. His speech to the jury was partially argument and partially testimony. He accused defendant of using "very nasty, profane language." There was no evidence of this. Plaintiff excoriated defendant, based upon matters related by the defendant to plaintiff while seeking advice as to the divorce proceedings. The case was tried in an improper manner.

The judgment cannot be permitted to stand. It is reversed and the cause remanded.

REVERSED AND REMANDED.

Matchett and O'Connor, JJ., concur.

of misconduct [illegible]

his administrative [illegible]

related at a [illegible]

touching the propo[illegible]

ant, all of [illegible]

Such testimony [illegible]

testimony was permitted.

Protections [illegible]

privileged communications [illegible]

policy excludes for [illegible]

from permitting their [illegible]

People v. Barcolay, [illegible]

Shulsdt v. Burger, [illegible]

Dickerson v. Dickerson, [illegible]

Plaintiff [illegible]

denounced defendant [illegible]

was no testimony. [illegible]

and partially [illegible]

profane language." [illegible]

correlated [illegible]

plaintiff while [illegible]

case was tried in [illegible]

The judgment [illegible]

and the cause remanded.

Matchett and O'Connor, [illegible]

40153

CHICAGO TITLE AND TRUST COMPANY,
a Corporation, as Trustee,
Plaintiff-Appellee,

vs.

A. WORTELL, Intervening Petitioner
and Appellant,

HARRIET HENNING and COMMITTEE FOR
THE PROTECTION OF LEIGHT AND COMPANY
BONDHOLDERS et al.,
Defendants-Appellees.

APPEAL FROM CIRCUIT
COURT OF COOK COUNTY.

19A

297 I.A. 642[4]

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This appeal is by an intervening petitioner from a decree approving a plan of reorganization entered January 17, 1938, and a further decree approving a report of sale and distribution entered January 18, 1938. The original action was by the trustee to foreclose a trust deed given to secure payment of bonds of the principal amount of $55,000. The premises, 36 X 125 feet, are improved by a 3-story and English basement building containing 16 unfurnished apartments; 3 of 4 rooms, 3 of 3½ rooms, 9 of 2½ rooms, and 1 of 3 rooms in the basement. The foreclosure decree was entered May 28, 1932, finding due $60,011.70 with interest from January 14, 1932, and an additional sum of $2853.50 for costs. The premises were not offered for sale under the decree until August 18, 1937, when they were struck off to Marion E. Hammond, nominee of a bondholders' protective committee, for $17,000. A. Wortell, intervenor, claiming to own a bond for $500, objected to the approval of the sale and also to the approval of the plan of reorganization, which the petition of the bondholders' committee asked might be approved. The petition and objections were referred to a special commissioner who took the evidence and recommended approval.

As already stated, the report of the special commissioner was approved January 17, 1938, and the report of sale on the fol-

CHICAGO [illegible]
a Corporation, [illegible]

vs.

A. CORTELL, [illegible]

HARRIET [illegible] and [illegible]
THE PROTECTIVE [illegible]
DEPENDENTS et al.,
[illegible]

MR. JUSTICE [illegible]

This [illegible] approving a plan of reorganization [illegible] further [illegible] January 15, 1932. [illegible] close a first [illegible] amount of $58,000. The [illegible] 3-story [illegible] apartments; 3 of [illegible] 3 rooms in the [illegible] 28, 1932, [illegible] 1932, and an additional [illegible] were not offered [illegible] when they were [illegible] holders protective [illegible] claims, to own [illegible] sale and also to [illegible] the petition of [illegible] The petition and objections [illegible] who took the evidence [illegible]

No [illegible] was approved [illegible]

lowing day. These are the orders from which the intervenor has appealed.

It is urged against the order approving the plan of reorganization that it was not based on "adequate trustworthy information" nor the result of "informed, independent judgment." It is contended the sale was manifestly unfair because no evidence of value was received or requested by the court. The intervenor cites First National Bank v. Bryn Mawr Beach, 365 Ill., 490; Straus v. Anderson, 366 Ill. 426; and First National Bank v. Flershem, 290 U. S. 405, 78 L. Ed. 405. The last named case in particular is relied on. The gist of the first objection seems to be that the court, as it is claimed, did not require affirmative proof by the committee that the sale price was adequate. The reply is that in the proceedings before the master (which the intervenor did not abstract) such proof appears. This proof showed that the gross income from the property collected by the receiver by whom it was operated from March 1, 1931, to December 19, 1936, was $32,077.89; that the operating expenses for the same period were $25,507.53, leaving a net of $6,570.36 (less on an average than $1200 a year) during the receivership period; that in the hands of Mrs. Henning, as the nominee of the committee to whom possession was delivered by the receiver pursuant to order of court December 1, 1936, the gross income from that date to May 31, 1937, (7 months) was $3,777.50, with operating disbursements during the same period of $2,132.43, leaving a net income of $1,245.07; that the average net income during both these periods amounted to a little more than $1300 a year; that outstanding taxes at the time the sale was made was of the estimated amount of $7,200, which amount added to the amount bid makes the sale price the equivalent of $24,200. If the net income is capitalized on the basis of 8% (the Bryn Mawr case suggested that either 8% or 10% might be used) the value of the

lowin[illegible] say.

appeal.

It is [illegible]

organizati[illegible]

formation" no[illegible]

It is [illegible]

of value [illegible]

cites first [illegible]

v. Anderson, [illegible]

290 U.S. 108, 78 [illegible]

is relied on. [illegible]

the court, [illegible]

the co[illegible]

in the proceeding [illegible]

abstract) [illegible]

income from [illegible]

operated from [illegible]

that the corporation [illegible]

leaving a net of $6,[illegible]

during the [illegible]

as the business [illegible]

by the receiver [illegible]

gross income from [illegible]

$3,777.[illegible], with [illegible]

$2,132.43, leaving [illegible]

income tax [illegible]

$13[illegible] a year; [illegible]

was of the attitude [illegible]

amount did [illegible]

net income is [illegible]

suggested that [illegible]

premises would be $26,687.50. In the Bryn Mawr case the price bid plus taxes amounted to $1,153,408.75. The value arrived at by capitalization of the income at 8% was about $1,750,000. The court said that the chancellor had a wide discretion and sustained his approval of the sale.

In the second place the intervenor contends that the court erred in striking testimony of value offered before the chancellor and in failing to require the Bondholders' Committee or the intervenor to offer additional testimony. Upon the hearing before the chancellor the intervenor offered the testimony of two witnesses, Abraham Melnick and Leonard Rosenblatt. These witnesses gave evidence tending to show the cost of construction of the building in 1927 and the usual amount allowed per annum for depreciation thereafter. They also gave evidence as to the reasonable rental value of apartments such as the building contained. This evidence was stricken on the ground that it was not responsive to the real issue in the case, namely, that it did not tend to show the fair cash market value of the premises at the time the same were offered for sale. The ruling was technically correct. Forest Preserve District v. Chilvers, 344 Ill. 573; Department of Public Works v. Hubbard, 363 Ill. 99; City of Chicago v. Witt, 289 Ill. 520. It was not error to exclude the evidence.

The intervenor contends in the third place that the plan was unfair, the bid grossly inadequate, and the order of confirmation should have been set aside for that reason. The plan submitted by the Bondholders' Committee provided for the conveyance of a 10% interest to the owners of the equity of redemption in exchange for a conveyance of their interest and the release of certain junior encumbrances and judgment liens. It is argued this was unfair to the bondholders for the reason that if the interest thus conveyed had any value the bonds which were superior to each and every such

interest would have been worth par. It is said these interests would have been obliterated by the expiration of the period of redemption and had no value except that their ownership by the committee would prevent a redemption and that the allowance of 10% to such owners was not justified. It has been held otherwise under analogous circumstances by the Supreme court of the United States in Meyer et al., v. Kenmore-Granville Hotel Co., 80 L.Ed. 557, by the Federal Court of Appeals for the 7th Circuit In the Matter of the Georgian Hotel Corporation, 82 Fed. (2d) 917, and by this court in Himmel v. Straus, 288 Ill. App. 566. It is a matter of common knowledge that business men regard such intervening rights as having considerable value and the payment of considerable sums to get them out of the way is not unusual.

It is also urged that the bid was grossly inadequate. It does not appear that any other bid was made or that any other purchaser now appears to guarantee a better bid in case the premises are again offered for sale. It is said that the trust indenture authorized the trustee to bid on behalf of all the bondholders, and that the trustee was bound to exercise a reasonable discretion in this respect; that the court should have fixed an upset price and directed the trustee to bid up to the amount of that price. The intervenor did not petition the court to have an upset price fixed and this suggestion was not made in the exceptions to the report approving the plan. The trustee was not obligated to make a bid on its own account and it was not able to make such a bid unless the bondholders put into its hands bonds sufficient to be used in lieu of cash.

At the time the intervenor entered her appearance in this case she owned $500 worth of bonds. At the time of the decree she seems to have acquired bonds to the amount of $4500. There was evidence tending to show she demanded a price for her bonds in

interest would [illegible] would have been [illegible] redemption [illegible] committee [illegible] 10% to each owner [illegible] under analogous [illegible] States in Meyer [illegible] 557, by the Federal [illegible] Matter of the [illegible] this court in [illegible] of common [illegible] rights in having [illegible] same to get them on [illegible].

It is also [illegible] does not appear [illegible] chaser now [illegible] are again offered [illegible] authorized [illegible] that the trustee [illegible] this respect; [illegible] directed the trustee [illegible] interveno did not [illegible] and this suggestion [illegible] approving the plan. [illegible] on its own account [illegible] the bondholders put [illegible] lies of ocean.

At the [illegible] case she owned $800 [illegible] seem to have suggested [illegible] evidence tending to [illegible]

consideration of refraining from interposing objections to the approval of the sale and of the plan of reorganization. Intervenor had a legal right to do this. But courts are slow to give assistance to an owner of a small part of obligations of this kind, who seeks a position where he can profit at the expense of other holders. Eighty-six per cent of the holders of these bonds are satisfied and wish to have the plan approved. One holder (speculating) objects.

The decree is affirmed.

AFFIRMED.

McSurely, P. J., and O'Connor, J., concur.

consideration [illegible]

approval of [illegible]

had a legal [illegible]

to an owner [illegible]

a position [illegible]

Eighty-six [illegible]

and will [illegible]

the decree is affirmed.

[illegible]

Respectfully, [illegible]

ANNA R. LESLIE,
Appellant,

v.

A. R. E. WYANT, et al.,
Appellees.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Anna R. Leslie appeals from an order of the Circuit Court entered January 20, 1938, whereby the clerk of the court was directed to pay over to the Wyants money theretofore deposited by her with the clerk, under an order entered June 22, 1935, in a case then pending between the parties wherein she was plaintiff. The case was before this court on former appeal (Leslie v. Wyant, 293 Ill. App. 626) where a decree which dismissed the complaint for want of equity was affirmed.

The bill concerned certain real estate at No. 9419 Wabash Avenue, Chicago, of which plaintiff was in possession and which she claimed to own notwithstanding a conveyance thereof by deed to Anna M. Emanuelson. The bill prayed that defendant should be restrained from ousting plaintiff from the premises; that the contract made with Anna M. Emanuelson should be set aside, the deed declared to be a mortgage and for general relief. While this cause was pending in the Circuit Court on June 22, 1935, an order was entered directing plaintiff (who continued in possession of the premises) to deposit $30 per month with the clerk of the court. $300 was paid to the clerk pursuant to this order. The final decree (which is already stated) dismissed the complaint of Anna R. Leslie for want of equity expressly provided the court reserved jurisdiction to pass on the question of whether this money should be paid to Anna R. Leslie or the Wyants. After the decree dismissing plaintiff's bill had been affirmed on January 28, 1938, the Wyants filed their petition in the cause reciting the decree, the appeal and the affirmance thereof, the entry of the order of June 22, 1935, for deposit of the money pending

the suit in lieu of bond, and prayed that the money be turned over to the petitioners. The plaintiff answered admitting that the money was deposited in accordance with the order of June 22, 1935, but said it was not for rent as set forth in the petition; that the final decree in the cause was entered on November 20, 1936, and that the pleadings in the case afforded no warrant of authority by the court to give affirmative relief in that no counter-claim or cross-bill was filed in the cause. The court was, therefore, it was asserted, without jurisdiction of the parties or the subject matter. The order of January 28, 1938, found that the court had jurisdiction of the parties and subject matter and that after hearing from all the parties concerned and having considered the answer to the petition and the orders it was decreed the $390 on deposit with the clerk, pursuant to the order of June 22, 1935, be paid to the Wyants.

An examination of the order entered June 22, 1935, discloses that the deposit of this money was conditioned upon the entry of an order restraining the Wyants (legal owners) from interfering with the possession of the plaintiff. It was evidently designed to indemnify the defendants for their loss of rent during such time as they might wrongfully be kept out of possession of the premises by the injunction. The final decree retained jurisdiction to determine who was entitled to receive the money, and the petition filed after the decree was affirmed in this court was sufficient pleading without the filing of a formal cross-bill or counter-claim. Plaintiff answered the petition so there is no question about due process. No reason is shown why the order should be reversed. It will be affirmed.

AFFIRMED.

McSurely, P.J., and O'Connor, J., concur.

the suit in lieu of [illegible]
over to the petitioners. The [illegible]
the money was deposited [illegible] of June 6,
1955, but said it was not [illegible] a petition;
that the first Court [illegible] No,
1956, and that [illegible]
authority by the [illegible]
counter-claim [illegible] case. The court
was, therefore, [illegible]
parties or the subject [illegible]
found that the court [illegible]
matter and that [illegible]
having concluded the [illegible]
decreed the [illegible]
of June 22, 1955, be [illegible].

An [illegible] disclosed that the lapsed of [illegible]
entry of an order [illegible]
forting with the [illegible]
designed to indemnify the [illegible]
such time as they [illegible]
promises by the [illegible]
to determine [illegible]
filed after the [illegible]
pleading without the [illegible]
plaintiff answered [illegible]
process. No [illegible]
will be affirmed.

[illegible]

McSurely, P.J., and [illegible].

40192

CONTINENTAL CASUALTY COMPANY,
a Corporation,
Appellant,

vs.

ARTHUR H. HEIN et al.,
Appellees.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

297 I.A. 643

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This appeal, coming to this court by transfer from the Supreme Court (Continental Casualty Company v. Hein, 368 Ill.289) is now before us on rehearing granted. The appeal is by plaintiff from an order entered on motion of defendants dismissing the third amended bill of complaint. The motion was supported by affidavit and counter-affidavits were filed in conformity with the practice prescribed by Section 48 of the Civil Practice act. The third amended bill was filed March 31, 1937. The record does not disclose the date of filing of the original bill. The motion to dismiss, filed April 10, 1930, was joint and several and asserted the bill should be dismissed because plaintiff was without capacity to sue, because another action representative in its nature was pending to determine the liability of defendants, and because the issues presented had been adjudicated against plaintiff in a prior proceeding in that suit.

The material facts are that on and prior to July 21, 1927, plaintiff was a corporation under the laws of Indiana authorized to conduct a surety business in Illinois and New York. Its Illinois office was at 910 South Michigan avenue in Chicago. The Milwaukee-Western State Bank was a banking corporation under the laws of Illinois. It desired a stay of execution on a judgment obtained against it in the Supreme Court of New York in favor of the Public National Bank & Trust Company and requested plaintiff to execute a bond upon its promise of indemnity. The judgment of the Supreme

Court of New York was affirmed March 31, 1928. The Milwaukee-Western State Bank failed to pay this judgment. The Public National Bank and Trust Company sued plaintiff on its bond. The Milwaukee-Western State Bank failed to defend the suit or advise plaintiff with reference to it. July 10, 1928, the Public National Bank and Trust Company recovered judgment against plaintiff for $11,285.01 with interest and costs. The Milwaukee bank refused to pay this judgment as demanded, and on July 12, 1928, plaintiff paid the judgment and then demanded that the Milwaukee Bank (which at that time had changed its name to the American Bank and Trust Company) repay it. The Milwaukee Bank refused. July 31, 1928, plaintiff sued the American Bank & Trust Company in the Superior court of Cook county on its promise to indemnify, and March 27, 1931, obtained judgment for $12,943.95, on which execution issued and was returned unsatisfied June 6, 1931.

August 1, 1930, the American Bank & Trust Company entered into a consolidation agreement with the Armitage State Bank, another banking corporation organized under the laws of Illinois. By the terms of the agreement the Armitage State Bank took over all the assets of the Trust Company Bank. The capital stock of the Armitage State Bank was increased from $200,000 to $250,000. The outstanding stock of both banks was surrendered to the consolidated bank. Holders of the Armitage State Bank who joined in the consolidation received an equal number of shares in the consolidated bank, while like holders of stock of the Trust Company Bank received one share in the consolidated bank for every six shares held in the Trust Company. The debts and obligations of every kind and nature of the Armitage Bank were assumed by the consolidated bank. The deposit liabilities of the Trust Company were assumed but no provision was made for paying the indebtedness due to plaintiff. The consolidation agreement by its terms was to

Court of [illegible]

Western [illegible]

Bank and Trust [illegible]

Western Stone [illegible]

with [illegible]

Trust Company [illegible]

with interest [illegible]

judgment as [illegible]

judgment [illegible] (with [illegible] that time had [illegible]

repay it. The [illegible]

sued the [illegible] County [illegible] of Cook county [illegible]

tained jurisdiction [illegible] and was returned unsatisfied [illegible].

[illegible]

into a [illegible] bankrupt banking corporation [illegible] terms of the [illegible] assets of the [illegible] stage State Bank [illegible] outstanding stock [illegible] bank. Holders of [illegible] solidation [illegible] bank, while [illegible] received one share [illegible] hold in the Trust [illegible] kind and nature of [illegible] dated bank. The [illegible] assumed but no [illegible] to plaintiff. [illegible] terms was to

become effective upon approval of 2/3 of the shares of stock in each of the participating banks, and the filing in the Recorder's office of the document required by law. Plaintiff was not a party to the consolidation agreement and did not consent to it. The consolidated bank continued in business until June 9, 1931, when it was closed by the Auditor of Public Accounts. On July 22, 1931, a receiver was appointed and the appointment approved by the Superior court of Cook county.

February 19, 1932, Harry N. Grover and others, creditors of the consolidated bank, filed in the Superior court a representative suit for and on behalf of all creditors of the consolidated bank against the bank and its stockholders to enforce their constitutional and statutory liability. The case was No. 552840. Thereafter, an amended and supplemental bill was filed, and on June 4, 1935, a decree was entered which found unsatisfied liabilities to the amount of $386,610.65. The number of creditors was found to be 9500, and judgment was entered against the stockholder defendants according to their respective liabilities as found by the decree. The decree directed that an injunction issue against creditors bringing other suits against the stockholders without leave of court.

Defendants argue that plaintiff is without capacity to maintain this separate suit as an individual creditor because of the representative suit pending in behalf of all creditors. We are not convinced. It is undoubtedly true plaintiff could not maintain an individual suit against stockholders of the consolidated corporation because of the representative suit in which the liability of the consolidated bank's stockholders has been definitely determined. (Golden v. Cervenka, 278 Ill., 409; Zimmerman v. Zeimer, 363 Ill.

become effective [illegible] on [illegible] in each of the parties [illegible] in the [illegible] in the [illegible] office of the [illegible] [illegible] to the consolidation [illegible] consolidated bank [illegible] it was closed by the [illegible] a receiver was appointed [illegible] by the superior court of [illegible].

Thereafter, in [illegible] of the consolidated [illegible] tive suit for an [illegible] bank against the [illegible] tutional and statutory [illegible] after, an amended and supplemental [illegible] 1935, a decree was entered [illegible] the amount of $[illegible] be $500, and judgment was entered [illegible] according to their respective [illegible] The decree directed that an injunction issue against creditors bringing other suits against the [illegible] court.

Defendants are [illegible] maintain this separate suit [illegible] the representative suit [illegible] not convinced. It is [illegible] an individual suit [illegible] tion because of the [illegible] the consolidated [illegible] (Golden v. Cornwell, [illegible] [illegible], 283 [illegible].

220; Sanders v. Merchants State Bank, 349 Ill., 517; Heine v. Degen, 362 Ill., 357.) Plaintiff's suit is not against the consolidated bank nor against its stockholders. It is against the Milwaukee-Western State Bank (also known as the American Bank & Trust Co.) and its stockholders. Plaintiff is a judgment creditor of that bank. The amended bill avers plaintiff is the only creditor of that bank. Defendants say this is a mere conclusion, and that it was asserted otherwise in an affidavit presented in support of the motion to dismiss. If the affirmation of this fact was a mere conclusion the denial of it was also a conclusion. Under section 48 of the Civil Practice act the issues should have been tried out at the hearing. The record shows that plaintiff was a creditor of the Milwaukee-Western State Bank long prior to the date of its consolidation with the Armitage State Bank. Plaintiff did not in any way take any part in the consolidation proceedings and did not accept or agree to substitute the liability of the consolidated bank for that of its original creditor. The substitution could not be made without plaintiff's consent. The obligation of the Milwaukee Bank was not wiped out by its consolidation with another corporation. The Banking Act (chap. 16½, sec. 12, Ill. State Bar Stats., 1937, p. 105) provides that the consolidation of one such corporation with another "shall not affect suits pending in which such corporations or corporation shall be parties; nor shall such changes affect causes of action, nor the rights of persons in any particular; nor shall suits brought against such corporation by its former name be abated for that cause." Defendants who moved to dismiss plaintiff's third amended complaint were twenty in number. Only two of these were stockholders of both the Milwaukee-Western State Bank (whose name was changed to American Bank & Trust Company) and the consolidated Armitage State Bank. There were, therefore, eighteen stockholders of the American Bank & Trust Company who did not exchange

220; Gardner [illegible] 1 [illegible] 1 [illegible],
382 [illegible]), [illegible]
bank not [illegible]
Western [illegible]
and its [illegible]
bank. [illegible]
that bank. [illegible]
was asserted [illegible]
motion to [illegible]
clusion the [illegible]
of the civil or [illegible]
the hearing. [illegible]
Milwaukee-Western [illegible]
dation with the [illegible]
take any part in [illegible]
or agree to enter [illegible]
that of its [illegible]
without [illegible]
was not sized out or [illegible]
The banking act [illegible]
p. 108) provides [illegible]
with another "[illegible]
tions or corporations [illegible]
cause of action, [illegible]
small suits from [illegible]
stated for [illegible]
third amended [illegible]
were stockholders [illegible]
case was changed to [illegible]
dated April [illegible]
holders of the [illegible]

their stock for stock in the consolidated bank. The stock of these persons (defendants here) was apparently disposed of by sale to the consolidated bank or to some other person. The amendment of Section 12, requiring that stock of holders dissenting should be paid for at appraised value, while enacted at this time had not been ratified by referendum, (see Section 12, p. 195.) It may be that the provisions of the section were voluntarily followed by the parties interested. At any rate these eighteen persons never became stockholders of the consolidated bank. Two defendants were stockholders of both the Milwaukee or American Bank & Trust Co. and the consolidated Armitage State Bank. If these two might properly be heard to object to two suits based upon their constitutional and statutory liability it would by no means follow that these eighteen stockholders (who never became stockholders in the consolidated bank and who have never been made defendants to any suit to enforce their liability) should now be held to be exempt. No case is cited in the brief presenting a similar situation. On principle it would seem that as against plaintiff these eighteen stockholders of the Milwaukee-Western State Bank are liable if (as is alleged in plaintiff's third amended complaint) the indebtedness of that bank to plaintiff accrued during a period of time in which these defendants were holders of stock in the Milwaukee State Bank. It may well be (as cases cited by defendants indicate) that after the consolidation the Armitage State Bank by reason thereof was liable to plaintiff for this indebtedness in case plaintiff elected to enforce the liability. It would by no means follow that these eighteen were released from their liability.

Another ground alleged for the dismissal of the bill was that the issue had been adjudicated in the prior proceeding which was a bar to this suit. The record shows that in the case brought

their stock not took in the consolid[illegible] [illegible], the stock of some persons (defendants [illegible]) was [illegible] or by sale to the consolidated bank or to some other person. [illegible] Section 12, requiring that stock of others [illegible] should be paid for at appraised value, while [illegible] [illegible] been ratified by referendum (see section 12, [illegible]) [illegible] that the provisions of the section were [illegible] by the parties interested. [illegible] stockholders of [illegible] and the consolidated [illegible] properly be [illegible] tutional and statutory liability [illegible] these eighteen stockholders (who never [illegible] consolidated bank and who [illegible] ault to enforce their liability) should [illegible] No case is cited in [illegible] principle it would seem that [illegible] stockholders of the [illegible] is alleged in plaintiff's [illegible] of that bank to plaintiff [illegible] these defendants were [illegible] It may well be [illegible] the consolidation [illegible] liable to plaintiff [illegible] to enforce the liability. [illegible] eighteen were released [illegible] their liability.

Another ground [illegible] that the issue had been adjudicated in the [illegible] was a bar to this suit. The record [illegible] in the case brought

by the Auditor, No. 540196 in the Superior court, plaintiff filed an intervening petition setting up facts as heretofore recited concerning the indebtedness due to it and the circumstances under which the consolidation of the two banks took place. The petition averred that there were no assets in the debtor bank out of which this judgment might be satisfied, and that the transfer of assets to the consolidated corporation was as to it fraudulent and in derogation of its rights. The petition prayed the receiver be required to account for all assets received from the American Bank and Trust Company and that these assets be declared to be impressed with a trust in plaintiff's favor and the receiver required to satisfy the debt to plaintiff out of such assets. The receiver demurred to the petition and the demurrer was sustained. It is now claimed that the ruling upon the demurrer there amounted to an adjudication of the issues here presented by plaintiff's complaint. We cannot accede to this view.

The defendants named in the petition were the Armitage State Bank and its receiver appointed by the Auditor and in charge of the property of the consolidated bank. The defendants here are the shareholders of the Milwaukee-Western State Bank. The parties are not the same. In the second place, the issue presented upon the petition was whether the property described in it had been fraudulently transferred in such manner as to impress a constructive trust upon it in plaintiff's favor. The issue here is whether the defendants are personally liable to contribute to the satisfaction of plaintiff's judgment by reason of their constitutional and statutory liability. Neither the parties, the subject matter nor the issues in these two proceedings are identical. Under such circumstances the rule of res adjudicata is not applicable. (Hoffman v. Hoffman, 330 Ill., 413; People v. Hart, 332 Ill. 467; People v. The University of Illinois, 357 Ill. 369; Harding Co. v. Harding,

by the [illegible]
an [illegible]
concerning [illegible]
which [illegible]
averred [illegible]
this [illegible]
to the [illegible]
deprivation [illegible]
required to [illegible]
and Trust [illegible]
with a trust in [illegible]
satisfy the [illegible]
demurred to [illegible]
now claims [illegible]
adjudication of the [illegible]
We cannot accede to this [illegible].

The [illegible]
Bank and its receiver [illegible]
property of the [illegible]
shareholders of the [illegible]
not the [illegible]
position was [illegible]
family trustees [illegible]
trust upon it in [illegible]
defendants; [illegible]
of plaintiff's [illegible]
statutory liability [illegible]
the issues in [illegible]
circumstances the [illegible]
man v. [illegible]; [illegible]
v. [illegible]

352 Ill., 417; Crowder Seed Co. v. Industrial Commission, 347 Ill. 86; and People v. C. & E. I. Ry. Co., 336 Ill. 506.) We hold neither the doctrine of res adjudicata nor its companion doctrine of estoppel by verdict is applicable.

Plaintiff contends that the pendency of the suit to enforce the statutory liability of the stockholders of the Armitage State Bank is not pleadable as a prior suit pending in defense of plaintiff's action. The liability of such stockholders cannot in the nature of things be established upon an equitable basis other than by such a suit. We think the court in its discretion and as a matter of convenience might have properly directed that all the stockholders of the Milwaukee-Western State Bank who exchanged their stock in that bank for stock in the consolidated bank should have their rights determined in that proceeding. However, this would not justify an order dismissing plaintiff's bill. Plaintiff is entitled to maintain its suit against the 18 stockholders of the Milwaukee-Western State Bank. As to the remainder of the defendants who are already impleaded in the prior suit against the Armitage State Bank and who by the consolidation became stockholders of that bank, it is entitled, if it so desires, to have an accounting. If the suit should have been dismissed as to these two defendants, it nevertheless was error to dismiss it for want of equity as to the other defendants who were stockholders of the Milwaukee-Western State Bank who never became stockholders of the consolidated bank and who were not defendants to the bill brought to enforce their liabilities as stockholders of that bank.

The judgment is reversed and the cause remanded with directions to deny defendant's motion to strike and for rule to answer.

REVERSED AND REMANDED WITH DIRECTIONS.

McSurely, P. J., specially concurs. See next page.

O'Connor, J., dissents. " " "

352 Ill., 417; Grove v. Grand Trial Commission, 47 Ill. 86; and People v. C. & E. I. Ry. Co., 356 Ill. 306.) We hold neither the doctrine of res adjudicata nor its companion doctrine of estoppel by verdict is applicable.

Plaintiff contends that the decree of the suit to enforce the statutory liability of the shareholders of the mortgage of the Bank is not pleadable as a prior suit pending in defense of plaintiff's action. The liability of such shareholders under the nature of things or established usage of liability rests rather than by such a suit. We think the court in the discretion of as a matter of convenience might have properly proceed to try the stockholders of the Milwaukee-Western State Bank, who had deposited their stock in that bank for stock in the Milwaukee-Western State Bank, should have their rights determined in that proceeding. However, this would not justify an order its taking plaintiff's suit. Plaintiff is entitled to maintain its suit against the stockholders of the Milwaukee-Western State Bank. As to the remainder of the defendants who are already impleaded in the prior suit against the Heritage State Bank and who by the consolidation became stockholders of that bank, it is contended, if it is material, to have an accounting. If the suit should have been dismissed as to these two defendants, it nevertheless was error to dismiss it for want of equity as to the other defendants who were stockholders of the Milwaukee-Western State Bank who never became stockholders of the consolidated bank and who were not made parties to the bill brought to enforce their liabilities as stockholders of that bank.

The judgment is reversed and the cause remanded with directions to deny defendants' motion to strike and for full to answer.

REVERSED AND REMANDED WITH DIRECTIONS.

McSurely, P. J., specially concurs. See next page.

O'Connor, J., dissents. " " "

McSurely, P. J., specially concurring: With the understanding that the eighteen stockholders of the Milwaukee-Western Bank who are defendants here are not defendants in the representative suit against the Armitage State Bank, and that plaintiff must prove that it is the sole creditor of the Milwaukee-Western State Bank, I concur in the foregoing conclusion.

O'Connor, J., dissenting: I dissent because it has been repeatedly held that an individual creditor of a bank may not maintain a separate suit against stockholders of a defunct bank when there is pending a representative suit on behalf of all the creditors of the bank against the bank stockholders. It was so held by the Supreme court in the opinion transferring this case to this court, where some of the former opinions of our Supreme court are cited.

In transferring the case Mr. Justice Stone, in delivering the opinion of the court said, 368 Ill. 289, p. 290: "On February 19, 1932, a representative creditors' suit against the Armitage State Bank and its stockholders was filed in the Superior court. This cause proceeded to a decree fixing liability of various stockholders and retaining jurisdiction to further hear the proceeding by bringing in other stockholders not served." And continuing (pp. 291-292):

"In this third amended complaint of appellant the allegation is made that the complainant is the only creditor of the stockholders of the American Bank and Trust Company. The affidavit of defendants sets out the proceedings in which appellant sought to have its claim allowed as a preferred claim against the assets of

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the American Bank & Trust Company held by the Armitage State Bank. This affidavit also states that the complainant is not the only creditor against the stockholders of the American bank & Trust Company, but that there are many creditors who appear in the representative suit filed in the Superior court against such stockholders. ***" And it was further said (p. 293):

"The lack of capacity of a creditor to sue in his own behalf in a case of this kind has been so well settled in this State that there is no longer a question existing as to this point. Zimmerman v. Zeimer, 363 Ill., 220, and Golden v. Cervenka, 278 id. 409, definitely held that an individual creditor may not file or carry on a separate suit when there is pending a representative suit on behalf of all creditors. Likewise the liability of bank stockholders has been definitely settled by numerous decisions."

Plaintiff should be required to have his claim adjudicated in the representative suit, and if any stockholders have been omitted as defendants in that suit the court should see that they are brought it because, as stated by Mr. Justice Stone, the Superior court by the decree entered in the representative suit retained jurisdiction "to further hear the proceedings by bringing in other stockholders not served."

The banks were consolidated August 1, 1930, and the consolidated bank was closed by the Auditor of Public Accounts June 9, 1931 - about 10 months after the consolidation. It seems incredible that there is but one creditor of the American Bank & Trust Company, which was one of the banks entering into the consolidation.

the American Bank & Trust Company will by [illegible] or [illegible] to book. This affiliate also [illegible] [illegible] in not [illegible] only creditor against the [illegible] [illegible] & Trust Company, but [illegible] [illegible] [illegible] representative suit filed in [illegible] [illegible] stockholders. ***" [illegible] [illegible] [illegible]:

"[illegible] [illegible] [illegible] in the [illegible] suit in a case of this kind [illegible] [illegible] [illegible] that there is no longer a [illegible] [illegible] [illegible] point. Zimmerman v. Dell, 300 [illegible], [illegible] [illegible] v. Oliver, 175 Id. 409, definitely held that [illegible] [illegible] carry on a business suit [illegible] [illegible] representative suit on behalf of all creditors. [illegible] [illegible] of course [illegible] holders has been definitely settled by numerous decisions."

Plaintiff should be required to have [illegible] [illegible] in the representative suit, [illegible] in any [illegible] have been omitted as defendants in that suit the court should see that they are brought it because, as stated by Mr. Justice [illegible], the [illegible] court by the decree entered in the representative suit [illegible] jurisdiction "to further [illegible] proceedings by bringing in other stockholders not served."

The banks were consolidated August 1, 1931, [illegible] consolidated bank was closed by the [illegible] or [illegible] as [illegible] 1931 - about 10 months [illegible] consolidation. [illegible] seems [illegible] that there is but one creditor of the [illegible] company, which was one of the banks [illegible], [illegible] the [illegible].

40124

52A

JOSEPH COHN,
Appellee,

vs.

DAVID COHL and JAMES BAKER,
Appellants.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

297 I.A. 643[3]

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Joseph Cohn filed his complaint in chancery against defendants in which he alleged, in substance, that in 1933 he and defendant David Cohl entered into an oral agreement for a joint business venture to buy certain bonds; each was to furnish half the necessary moneys and divide any profits equally; that later they purchased five $1000 real estate bonds of the Hammond Standish Company of Detroit, for $1200, and at another time more of the same bonds, of the face value of $1600, for $448; that the bonds were afterward registered in the name of defendant Baker; that several months later a disagreement arose between plaintiff and defendant Cohl, and plaintiff was desirous of dissolving the joint venture. The prayer was that the joint venture or copartnership be dissolved, an accounting taken and a decree entered for any balance that might be due from either plaintiff or Cohl; that defendants be enjoined from selling or otherwise disposing of the bonds.

Defendants filed an answer and a counterclaim. The substance of the allegations are that the oral agreement between plaintiff and defendant Cohl was admitted, but it was averred that under the terms of the oral agreement plaintiff and defendant Cohl were to purchase tax warrants, jury vouchers and other types of securities issued by the taxing bodies of Cook county, as well as real estate bonds, and that they claimed the bonds in question as belonging to them; that in addition to the bonds involved there was still a balance due from plaintiff growing out of the trans-

JOSEPH [illegible]

v.

DAVID [illegible]

[illegible]

[illegible]

[illegible] sante in [illegible] all [illegible] [illegible] 19 [illegible] nd [illegible] ent David [illegible] [illegible] a joint venture to buy certain [illegible] necessary money and invite by [illegible] [illegible] chased five [illegible] pany of Detroit, for [illegible] bonds, of the [illegible] afterward [illegible] months later [illegible] Cohl, and plaintiff's [illegible] The prayer was [illegible] solved, on account [illegible] that it [illegible] be optional [illegible]

[illegible] absence of [illegible] plaintiff and defendant [illegible] under the terms [illegible] were to purchase [illegible] securities [illegible] as well as real estate [illegible] as between them [illegible] was still a [illegible] the trans-

actions carried on by the parties. The prayer of the counterclaim was that the partnership be dissolved, a receiver appointed, the surplus divided between the parties, and that plaintiff be enjoined from opening a safety deposit box in which the securities of the copartnership were kept, etc.

Defendant Cohl also filed what he designates "a separate action in law" as a counterclaim, alleging that on November 23 and December 12, 1934, plaintiff assaulted and injured him, and claimed damages of $15,000 for each assault.

Plaintiff filed an answer to the counterclaim in which he alleged he had invested in the partnership $10,000, while defendant Cohl had invested but $1000, although it had been agreed that each would invest an equal amount. He also denied the charge of assault. The case was referred to a master in chancery who took the evidence and made his report. The master went into considerable detail in discussing the evidence as to the method by which the parties did business under the oral agreement. He stated the account, which was that plaintiff owed defendants $291.53, and that plaintiff was entitled to an undivided one-half interest in the Hammond Standish company bonds of the face value of $6600, and recommended that a decree be entered dissolving the partnership; that defendants be ordered and directed to surrender the bonds to a clerk of the court and that upon such surrender plaintiff be decreed to be indebted to defendant Cohl for $291.53, and that the court retain jurisdiction for the purpose of enforcing the terms of the decree. Objections to the report were filed by both parties; they were overruled and ordered to stand as exceptions and were overruled by the chancellor. A decree was entered as recommended by the master and defendants were required to deposit the bonds with the clerk of the court within 30 days; and it was further decreed that upon surrender of the bonds they be sold by the master and the proceeds divided be-

actions [illegible]

was [illegible]

[illegible]

[illegible]

of the copyright [illegible]

Defendant [illegible] "[illegible] to action in law" [illegible]

and been [illegible]

claimed [illegible]

Plaintiff [illegible]

alleged in and [illegible]

Cohl had [illegible]

would [illegible]

The case was [illegible]

and made its report. [illegible] considerable detail in discussing the evidence [illegible] the parties did business under [illegible] account, which was that plaintiff [illegible] plaintiff was entitled to an [illegible] company [illegible]

decree be entered [illegible]; and [illegible] be ordered and [illegible] court and that upon [illegible] decreed [illegible] defendant Cohl for [illegible]

for the purpose [illegible]

to the report were [illegible]; [illegible]

ordered to [illegible]

A decree was [illegible]

were required [illegible]

within 30 days; [illegible] upon [illegible]

the [illegible] defendants [illegible]

tween plaintiff and defendant Cohl. Defendants appeal.

Defendants alone have filed a brief in this court. They contend that James Baker is an innocent bona fide purchaser of the bonds in suit, he having purchased them from defendant Cohl, who was his brother-in-law, and therefore the decree is erroneous. The master in analyzing the evidence found that Baker knew the facts in the matter and was not an innocent purchaser. Baker did not testify, and we think it clear the evidence warranted the finding of the master and of the chancellor. Certain it is that we cannot say the finding of the master, approved as it was by the chancellor, is against the manifest weight of the evidence, and in these circumstances we are not warranted in disturbing the decree. Pasedach v. Auw, 364 Ill., 491.

It is also said that "the decree is erroneous and defective" because it fails to completely settle the "partnership accounts" and all matters in controversy, and fails to follow the provisions of the Uniform Partnership act, especially sections 40 and 18(a); that the decree fails to determine Cohl's interest in the remaining assets, that it failed to consider the good will of the partnership, which has been retained and left in the possession of plaintiff. We think there is no merit in these contentions. The accounting made by the master goes into detail and shows that plaintiff owes defendant Cohl $291.53, and that plaintiff is entitled to a one-half interest in the $6600 face value of the bonds. Nothing has been pointed out to show that there was any good will of the partnership at any time. No books of account were kept and no bank account, but the securities and money of the partnership were kept in a safety deposit box over which plaintiff had control except that defendant had the bonds of the face value of $6600 in his possession or in the possession of defendant Baker. Nor is there any merit in the contention that the decree requires defendants to deposit the bonds

twee[illegible]

contend[illegible]

bonia [illegible]

his brot[illegible]

ter in [illegible]

the mar[illegible]

and we [illegible]

ter and [illegible]

tip'in [illegible]

against [illegible]

stance [illegible]

V. MAY.

[illegible]

because it [illegible]

and all [illegible]

of the [illegible]

that [illegible]

assets, [illegible]

while [illegible]

think [illegible]

by the [illegible]

ant [illegible]

terest in [illegible]

pointed out [illegible]

at [illegible]

the [illegible]

[illegible]

[illegible]

the [illegible]

contention [illegible]

with the clerk of the court. Since they were in defendants' possession there is nothing difficult for defendants to do in carrying out this part of the decree. The only thing they had to do was to hand over the bonds.

We think the decree ought not to be disturbed, and it is affirmed.

DECREE AFFIRMED.

McSurely, P. J., and Matchett, J., concur.

with [illegible]

possessed [illegible]

carrying [illegible]

to do [illegible]

[illegible]

affirmed.

[illegible]

McSurely, [illegible]

40199

LAURA HERMANN,
Appellant,

vs.

HERBERT CARL JOHNSON,
Appellee.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

297 I.A. 643

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

October 7, 1936, Laura Hermann filed her bill to foreclose a trust deed given by defendant Herbert Carl Johnson and his wife, Elizabeth Helen Johnson (Elizabeth died in 1936) to secure an indebtedness of $2900 evidenced by their note dated April 26, 1924. The trustee in the trust deed was also made a party defendant. After the case was at issue it was referred to a master in chancery who made his report and recommended a decree of foreclosure. The master found that defendant should be given a credit of $1206.69, which was made up of five items and after deducting these there was a balance of principal due of $1693.31; that plaintiff was entitled to interest from the date of the note, April 26, 1924, to May 18, 1937, aggregating $2167.88, making a total the master found due from defendant to plaintiff of $3861.19. The master also found plaintiff was entitled to $250 solicitors' fees. Objections to his report were overruled and they were ordered to stand as exceptions.

The chancellor found all of the principal had been paid except $500, $1600 having been paid in cash, and that defendant was entitled to $900 for board and lodging furnished by him to plaintiff at the rate of $100 every six months, leaving a balance of $500; and that plaintiff was entitled to $45 interest on the $500 from October 26, 1936. The decree also found that defendant was liable for the costs, including court costs, master's fees and attorneys' fees, making a total of $1141.55. As we understand the record, this sum was deposited by defendant with the clerk of the

40109

LAURA V. R[illegible]

Appellee,

vs.

HERSHEY CHOCOLATE CO.,

Appellant.

IN [illegible]

[illegible]

a true and [illegible] Hillsdale [illegible] 1930, to [illegible] indebtedness of [illegible]. The tractor [illegible]. After [illegible] who made it [illegible] master found [illegible] which was made [illegible] a balance of [illegible] to interest [illegible] 1937, [illegible] from defendant [illegible] plaintiff was [illegible] report were [illegible].

[illegible] except $500, [illegible] was [illegible] plaintiff [illegible] of $500; and [illegible] $500 from [illegible] was liable [illegible] attorney's fees, [illegible] record, [illegible] the clerk of the

court in accordance with the terms of the decree. Plaintiff prosecutes this appeal, contending that the amount found by the master to be due her is the correct amount.

The record discloses that defendant, Herbert Carl Johnson, was married to plaintiff's daughter, Elizabeth Helen Johnson; that in 1923 plaintiff, defendant and his wife all went to live in plaintiff's cottage; that April 26, 1924, plaintiff sold the cottage to defendant and his wife for $3,000; that $100 was paid in cash and defendant Johnson and his wife gave plaintiff their note for $2900, the balance of the purchase price, payable in installments of $100 every six months beginning October 26, 1924, executing a trust deed on the property to secure payment. The installment note, which is in evidence, bears endorsements to the effect that defendant paid the interest to April 26, 1925, and also paid $100 every six months on account of principal, the last payment being October 26, 1931, - a total of 15 payments of $100 each, aggregating $1500. There is also in evidence a receipt signed by plaintiff for $100, dated April 22, 1924, two days before the execution of the note and trust deed in foreclosure.

Defendant testified he made each of the payments endorsed on the back of the installment note; that the payments were made to plaintiff personally in the presence of defendant's wife, and that on each occasion plaintiff turned back the $100 for safe keeping to defendant's wife, who took care of all business matters for her mother, the plaintiff.

Defendant's testimony is further to the effect that in April, 1925, when he paid the last interest, plaintiff told him that thereafter she would not ask for any more interest, and that when he paid the last $100 on October 26, 1931, plaintiff told him he need make no further payments on the principal, that all plaintiff desired

[illegible]

[illegible]

[illegible]

[illegible]

was [illegible]

in 1922 [illegible]

plaintiff's [illegible]

[illegible]

and defendant [illegible]

$2000, [illegible]

of $100 [illegible]

trust deed [illegible]

which is [illegible]

and plaintiff [illegible]

six months [illegible]

26, 1931, [illegible]

There is [illegible]

dated April 2, [illegible]

trust deed in [illegible]

[illegible]

on the land of [illegible]

plaintiff [illegible]

on each occasion [illegible]

defendant [illegible]

mother, the [illegible]

[illegible]

1925, when [illegible]

after he [illegible]

the land [illegible]

no further [illegible]

was to continue to live with defendant and his wife, and that thereafter he made no further payments. The evidence further shows defendant's wife died in January, 1936, and about six months thereafter another daughter of plaintiff who lived nearby had her mother move from defendant's home and live with her. A short time thereafter demand was made on defendant that he turn over the trust deed, note, moneys and other properties belonging to plaintiff, and this was done, defendant testifying that at the time of his wife's death she had in her possession in the house $500, and that upon demand he turned over to plaintiff $460 of this money, having theretofore expended the balance in payment of a doctor's bill for plaintiff and a premium on an insurance policy; that this $500 was money which had been accumulating from the payments made by him to plaintiff.

Plaintiff testified, denying she had told defendant in April, 1925, or at any other time, that she would not require him to pay any interest thereafter. She further testified she did not tell defendant in October, 1931, or at any other time that he did not have to make further payments on account of the principal, that she just wanted to continue to live with defendant.

In his report the master found that plaintiff claimed the only money she had received from defendant toward payment of the note was the $460 given to her in August, 1936, after she had made demand upon him for the money and papers above referred to. The master further found that the burden of proving the payments was upon defendant. This is the law. The chancellor found defendant had maintained such burden by showing he had paid $1600 from the time of making the note and trust deed until October, 1931, which would leave a balance of $1400. Just how the chancellor found that plaintiff was entitled to a further credit of $900 is not clearly disclosed by the record so far as we have been able to ascertain. But counsel for defendant say that the chancellor allowed "$100 semi-annually

was to continue [illegible] after he made no further payments. [illegible] defendant's wife died in January, 1928, [illegible] after another lapse of [illegible] move from defendant's home and [illegible] after demand was made on [illegible] note, money and other properties [illegible] was done, defendant testifying [illegible] she had in her possession in the house [illegible] turned over to plaintiff [illegible] of this money, leaving [illegible] pended the balance in payment of a doctor's [illegible] a premium on an insurance policy, [illegible] been accumulating from the payments made by [illegible] plaintiff.

Plaintiff testified, denying [illegible] 1929, or at any other time, [illegible] any interest therein. [illegible] defendant in October, 1931, or at any other time [illegible] have to make further payments [illegible] that wanted to continue to live [illegible].

In his report the [illegible] only money she had received [illegible] note was the $400 [illegible] demand upon him for [illegible] master further found [illegible] upon defendant. This is the law. [illegible] had maintained such burden by showing he had paid $100 from the time of making the note and that dead until October, 1931, which would leave a balance of [illegible]. [illegible] plaintiff was entitled to a [illegible] credit of $[illegible] in not clearly disclosed by the record so far as we have been able to ascertain. But counsel for defendant say that the chancellor allowed "$100 semi-annually

for board and keep of the plaintiff and interest from October 26, 1931, to August, 1936, when the plaintiff was removed from his home." This statement is not controverted by counsel for plaintiff. We shall therefore assume this was what the chancellor did in arriving at his conclusion that there was but $500 principal due on the note.

There is evidence in the record that some of plaintiff's other children from time to time borrowed money from their mother; her daughter, Mrs. Ganly, with whom she is now living, and Mrs. Ganly's husband borrowed $300 from the mother April 19, 1927, giving her their note for that amount due nine months after date, which bears three endorsements aggregating $100, indicating the amount had been paid. There is also in evidence a receipt given plaintiff by her son Albert, dated January 22, 1926, for $200; and plaintiff's evidence is to the effect that she had no money or property except the $2900 mortgage. Two bank books are in evidence showing deposits and withdrawals of money, the accounts being in the name of plaintiff and her daughter, defendant's wife.

We think the evidence discloses the fact that plaintiff received from defendant more than the $460. This is shown by the two bank books showing deposits and withdrawals, by the money she lent her other children, and by some of the securities which the evidence indicates had been purchased for her by her daughter from time to time from the moneys she received from defendant.

We have been unable to find any evidence as to how the chancellor gave defendant credit for $100 every six months for board and lodging furnished plaintiff, but this was a rough sort of conclusion as to what should be allowed. McCabe v. Chicago N. W. Ry. Co., 215 Ill. App., 99, where we cite The Mediana, L. R. (1900) App. Cas. 113.

The decree of the Circuit court of Cook county is affirmed.

DECREE AFFIRMED.

McSurely, P. J., and Matchett, J., concur.

for clerk

1931, [illegible]

This statement

which t[illegible]

at his [illegible]

other [illegible]

her d[illegible]

carry'n [illegible]

her [illegible]

beard [illegible]

had [illegible]

by her [illegible]

evidence [illegible]

the $29 [illegible]

and without [illegible]

plaintiff [illegible]

recorded [illegible]

two been [illegible]

lend her other [illegible]

evidence [illegible]

time to time [illegible]

collar [illegible]

lod,ing [illegible]

as [illegible]

Ill. App. [illegible]

McCurdy [illegible]

39985

M. W. GOLDSTEIN,

Appellee,

v.

ALECK McALONAN, et al.,

Defendants.

On Appeal of CHARLES W. IRRGANG and EDITH IRRGANG,

Appellants.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

297 I.A. 643[5]

MR. PRESIDING JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

Plaintiff, as the assignee of a claim for mechanic's lien amounting to $2,340.00, after the deduction of certain credits, filed a claim in the Circuit Court of Cook County for the foreclosure thereof, and after a hearing before the Master to whom the cause was referred, and after a hearing was had on objections and exceptions to the Master's report, a decree was entered on October 26, 1937, sustaining the claimed lien for the sum of $1,700.00, with interest from May 28, 1936, and directing the sale of the real estate against which the claim was filed. This is an appeal from the decree. The defendants appealing, are the owners of the land on which the improvement was made. The record indicates that at the time of the hearing of the cause, defendant, Charles W. Irrgang was operating a gas station previously built on the land involved, the subject of this dispute.

On July 19, 1935, the plaintiff's assignor, Hattam & Nelson, building contractors, entered into a contract with Aleck McAlonan, lessee of the real estate involved, by the terms of which they proposed to furnish the necessary labor and material for the erection and completion of a gasoline service and filling station to be located at the southwest corner of Harlem Avenue and Diversey Avenue, in Elmwood Park, Illinois, according to plans submitted to them.

B. [illegible] LEMOCTSIN,

[illegible]

v.

ALICK [illegible],

Defendants.

On Appeal [illegible]
and ADLIN [illegible]

MR. [illegible]

[illegible]

amounting to [illegible], [illegible] in [illegible], the [illegible]
a claim in the [illegible]
thereof, and [illegible]
was referred, [illegible]
to the master's [illegible]
taining the [illegible]
from May 28, 1956, [illegible]
which the [illegible]
defendants [illegible]
ment was [illegible]
of the [illegible]
station previously [illegible]
dispute.

On July [illegible] Nelson,
building contractors, [illegible]
lease of the [illegible]
proposed to [illegible]
and completion [illegible]
located at the [illegible]
in Elmwood [illegible]

The southwest corner of Harlem Avenue and Diversey Avenue in Elmwood Park, Illinois is the location of the property on which the lien is claimed. The contract entered into between the parties recites, in substance, that the specifications are that plaintiff's assignor should excavate for one pit, foundations and footings to depth shown on plans; concrete footings and foundations according to plan; concrete mixture to be one part cement, two parts sand and four parts stone; concrete to be mixed in concrete mixer and placed in concrete forms; four inch cement floor in office and pit room; lay 2' 6" concrete walk on 2 front sides of building; lay two concrete driveways on Harlem Avenue of a certain width and depth, and one driveway on Diversey Avenue of a certain width and depth; build island for three pumps; fill driveways and grade with cinder, fill and cover with white screenings, giving width and legth of driveways. The contract also contains the following provision: All common brick walls to be laid with 4" of new brick on outside and 8" of used brick on inside; Harlem and Diversey Avenue sides to be common brick faced with stucco and trimmed as per plans. All brick work to be laid up in fresh lime and back sand. Carpenter work to be done as per plan. Used lumber for joists. All other to be new. Office to have 1 x 4 beaded ceiling. One light, one plug in office. One light in toilets. Two ceiling lights and one switch in pit room, 2 plugs in pit room, 1 outlet for air compressor and 2 lights and 1 switch in pit. Complete wiring and connecting for 2 flood lights, poles and flood lights to be furnished by owner. 2 closets, 2 wash basins, sewerage complete to street, 1 drain in pit, 1 hose outlet to outside of building, 1 airline from air tower to inside of building. 4 ply asphalt roof. Paint all outside iron and woodwork with 2 coats of paint. Paint inside brick walls with 2 coats of paint. Glaze all windows and doors as per plan. All of the above work to be

The southwest corner [illegible]
Park, Illinois [illegible]
is clayey. [illegible]
in substance, [illegible]
should excavate [illegible]
shown on plans, [illegible]
concrete mixture [illegible]
parts above; [illegible]
concrete form; [illegible]
3' 8" concrete [illegible]
driveways on [illegible]
driveway on [illegible]
island for [illegible]
and cover with [illegible]
way. The [illegible]
common brick [illegible]
of used brick [illegible]
common brick [illegible]
work to be [illegible]
be done as per [illegible]
office to have [illegible]
One light in toilet. [illegible]
2 plugs in pit [illegible]
switch in pit. [illegible]
pole and flood light [illegible]
beams, [illegible]
to outside of [illegible]
4 ply roofing [illegible]
of paint. [illegible]
all windows [illegible]

completed in good workmanlike manner for the sum of $3,200.00, payable as follows: $500.00 when foundations are in, and $200.00 when building is completed. The balance of $2,500.00 as follows: An assignment to the contractor of two cents per gallon of gas pumped until $1,000.00 has been paid, the balance of $1,500.00 at one cent per gallon. Lease to be assigned to Hattam & Nelson until paid in full. Interest on this unpaid balance at the rate of 6% until paid.

The points urged as grounds for reversal are that the evidence adduced was not sufficient to support a mechanic's lien, and that the right to such lien, if it existed, was released by a waiver thereof executed by the contractors. On the first point, it is insisted that the contract provided that the work "should be done according to plans", that such plans were not produced in evidence, that there was a variance between the work done and the specifications furnished, and that there is no proof that the amount of gasoline upon which certain of the payments are predicated, was sold.

John E. Hattam of the firm of Hattam & Nelson, the contractors, testified as to the work which was performed on the premises under the contract in question. He stated that the plans were used by the contractors in connection with the work done, that the firm of Hattam & Nelson furnished labor and materials, and that the work was done under his supervision; that certain fixtures provided for in the contract were furnished by the contractor to the owner, who refused to allow the contractor to connect them, that the owner then employed someone else to make such connections, and that this other person thereafter installed these fixtures. He also testified that prior to the assignment of the claim under the contract, he had received $950.00 on account of the work, including certain extras ordered by the lessee of the premises, which were furnished.

complete [illegible]

payable on [illegible]

when building [illegible]

An assignment to [illegible]

pumped until [illegible]

one cent per [illegible]

paid in full. [illegible]

until [illegible].

The [illegible]

evidence adduced [illegible]

and the [illegible]

waiver thereof [illegible]

it is insisted [illegible]

done according [illegible]

evidence, that [illegible]

specifications [illegible]

of reasoning [illegible]

said.

In [illegible]

contractors, [illegible]

premises under [illegible]

were used [illegible]

the firm [illegible]

the work was [illegible]

vided for in [illegible]

owner, who [illegible]

the owner then [illegible] tions, and

that this other [illegible] ture. He

also testified [illegible] of the claim under the

contract, [illegible] of the work, leaving

certain extra [illegible] premises, which are

furnished.

On the question of the waiver of lien, the record indicates that about November 30, 1935, Hattam executed the following instrument:

"Waiver of Lien - Partial Materials or Labor No. 300 — Horder's Inc. Chicago

State of Illinois,)
- - - County) ss

Nov. 30, 1935

TO ALL WHOM IT MAY CONCERN:

Whereas, --- the undersigned, John E. Hattam, --- has --- be employed by McAlonan --- Brick Work ---- to furnish ------- for the building known as S. W. Corner, Harlem and Diversey, Elmwood Park, Ill.

Now, Therefore, Know Ye, that ---- the undersigned, for and in consideration of - - - - Dollars, and other good and valuable considerations, the receipt whereof is hereby acknowledged, do - - - hereby waive and release any and all lien, or claim, or right of lien on said above described building and premises under the Statutes of the State of Illinois relating to Mechanics' Liens, on account of labor or materials, or both, furnished up to this date by the undersigned to or on account of the said ------- for said building or premises.

Given Under my hand - - - and seal - - - this 30th day of Nov. 1935.

John Hattam (Seal)"

This document was executed by filling out a printed blank form of waiver, and an examination of the original, which is a part of the record, indicates that the words "brick work" were written in by Hattam, the signer thereof. The record also indicates that it was Hattam who did the brick work in connection with the erection of the building in question, that he was paid for this work, and we are of the opinion that the waiver of lien was intended to apply only to this portion of the work.

Aleck McAlonan, the lessee of the property, was a witness on behalf of the defendants. Among other things, he testified to the effect that no closets or basins were installed by the contractors. On this question, we conclude from the record that it was these items, among others, which Hattam testified he was not allowed to install, but that the owner installed them himself. McAlonan also testified that he started to operate the filling station in September, 1935, and that "I am still working in the filling station (apparently for

on the [illegible]

that about [illegible]

Instrument:

"Waiver of Lien - Partial
Materials or [illegible]
State of Illinois,)
- - - County)

TO ALL WHOM IT [illegible]:
Whereas, [illegible]
--- be employed on [illegible]
------- for the [illegible]
Diversey, [illegible]
Now, therefore, [illegible]
and in consideration [illegible]
valuable consideration [illegible]
ledged, do - - - hereby [illegible] and all lien, or
claim, or right of lien [illegible] and
premises under the [illegible] relating to
Mechanics' Liens, [illegible] or both,
furnished on the [illegible] account
of the said ------- [illegible]
Witness [illegible] this 30th day
of Nov. 1926.

[illegible]

This document [illegible] form of
waiver, and an [illegible] part of the
record, indicates [illegible] written in by
Hatten, the signer [illegible] that it was
Hatten who did the [illegible] the erection of the
building in question, [illegible] of
the opinion that [illegible] may only to
this portion of [illegible].

Block [illegible], [illegible] on behalf of the [illegible] testifies to
the effect that [illegible] by the [illegible].
On this evidence, [illegible] these items,
among others, [illegible] to lose it,
but that the [illegible] Schumann-Heink Theatrical
that no [illegible] Schumann-Heink Theatrical [illegible],
and that "I am [illegible] (apparently for-

defendants]. I don't know exactly how many gallons of gas have been sold or pumped. I may have sold 50,000 or may have sold about 500,000 gallons of gas. I don't know how much". He also testified to the effect that Irrgang, one of the defendants, was on the premises a number of times and noted the work as it progressed; that he, Irrgang, was aware of the fact that the station was being constructed, and that certain fixtures were installed by some one other than the contractors.

We are of the opinion that the court was right in finding that the contract had been substantially performed as agreed. While certain items are mentioned as not having been constructed in accordance with the contract, we must conclude that the owners of this property were entirely cognizant of everything that was being done and made no protest, and that there is no merit in their contention that the contract has not been substantially complied with. No question is raised as to the amount found to be due.

In Bloomington Hotel Co. v. Garthwait, 227 Ill. 613, similar questions were raised as to whether a contract had been entirely complied with, and in exact conformity with the plans and specifications. The Supreme Court said:

> "Literal compliance with the provisions of a contract is not essential to a recovery. It will be sufficient if there has been an honest and faithful performance of the contract in its material and substantial parts and no willful departure from or omission of the essential points of the contract."

In Turnes v. Brenckle, 243 Ill. 394, and in other cases, the courts have adopted the rule that where a waiver of lien clearly expresses that it is only for a portion of the work done, it cannot be said to be a complete waiver. The decree of the Circuit Court of Cook County is affirmed.

AFFIRMED.

HEBEL AND DENIS E. SULLIVAN, JJ. CONCUR.

40049

MEYER ROTHSCHILD and ERNESTINE ROTHSCHILD, his wife, SAMUEL S. COHN and HELEN S. COHN, his wife, and ESTELLE WATERS DE LUE,

Appellants,

v.

EDWARD G. FELSENTHAL, CLARENCE L. COLEMAN, JR., MERVIN K. BAER, individually and as members of a bondholders protective committee for bonds sold by Baer, Eisendrath & Co., MORTON S. RIES, as nominee of the committee, THE WALDRATH COMPANY, individually and as despositary of the committee, REALTY MANAGEMENT COMPANY, a corporation, JOSEPH L. EISENDRATH And WALTER S. BAER, individually and as trustee under bond issues sold by Baer, Eisendrath & Co., and "UNKNOWN OWNERS",

Appellees.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

297 I.A. 644

MR. PRESIDING JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

Plaintiffs, Meyer Rothschild and Ernestine Rothschild, his wife, Samuel S. Cohn and Helen S. Cohn, his wife, and Estelle Waters De Lue, bring this bill of complaint against Edward G. Felsenthal, Clarence L. Coleman, Mervin K. Baer, individually and as members of a bondholders protective committee for bonds sold by Baer, Eisendrath & Company, Morton S. Ries, nominee of the committee, the Waldrath Company, individually and as depositary of the committee, Realty Management Company, a corporation, Joseph L. Eisendrath and Walter S. Baer, individually and as trustees under bond issues sold by Baer, Eisendrath & Company, and certain unknown owners of bonds. Stripped of epithets and redundancy, it appears that the action is one for an accounting against all or some of the defendants named, for the appointment of a receiver of certain properties named in the bill, and for a temporary injunction.

The bill charges that Meyer and Ernestine Rothschild, jointly, purchased certain bonds of five different issues from Baer, Eisendrath & Company, secured by real estate mortgages on various individual pieces of real estate; that Samuel S. and Helen S. Cohn,

jointly, purchased other bonds of fourteen different issues from Baer, Eisendrath & Company, secured by mortgages on various other individual pieces of real estate; that Estelle Waters De Lue purchased certain other bonds of fourteen different issues from Baer, Eisendrath & Company, secured by mortgages on various other distinct pieces of property. There is no showing, however, that any one of these securities so purchased by the various individuals, or any of the parties plaintiff, have or has any relationship to the other. The defendants, Edward G. Felsenthal, Clarence L. Coleman and Mervin K. Baer, who insofar as we can gather from the record were the only defendants served in the case, filed an answer to the complaint, and a motion that the complaint be dismissed for want of equity. After a hearing on this motion to dismiss, the court entered the following order:

> "This cause coming on to be heard upon the motion of the defendants herein to dismiss the complaint as amended and supplemented and the court having heard the arguments of counsel,
>
> "It is ordered that said motion be and it is hereby sustained and said complaint be and is hereby dismissed at plaintiff's costs.
>
> "Leave is granted plaintiffs to amend or elect to stand by said complaint within 30 days."

This is an appeal by all of the plaintiffs from the order of dismissal.

Plaintiffs charge that prior to December 16, 1930, Baer, Eisendrath & Company, a corporation, was engaged in the business of selling bonds secured by mortgages on real estate in the open market, and that Walter S. Baer, Mervin K. Baer and Joseph L. Eisendrath were its principal officers and directors, and that Clarence L. Coleman was one of its officers and in its employ; that this institution sold to the plaintiffs certain bonds specifically named in the bill, as 7% safe bonds; that at the time of the sale of the bonds, Baer, Eisendrath & Company agreed in writing to repurchase the bonds at any time at a price of 99%, plus accrued interest; that all of the

properties upon which mortgages were given to secure these bonds, were inflated in value, could not bear the burden of the amount of the bond issues, that thereafter defaults were made, and that to avoid repurchase of the securities and to enable the Baer, Eisendrath Company to continue in business, this institution concealed the defaults; that Baer, Eisendrath & Company entered into possession of the properties and reimbursed itself out of the income from moneys advanced on defaulted bonds without paying the general taxes, and permitted the properties to be forfeited or sold for nonpayment of taxes and penalties accrued. It is further alleged that subsequent to August 15, 1930, when this company was threatened with suits on the repurchase agreements, an accounting for moneys misapplied, and with a liability for gross negligence in the management of the company by its officers and directors, it devised a plan for the creation of two agencies, one a common law trust to deal with defaulted bonds, and the other, the Waldrath Company, for the purpose of continuing the business of Baer, Eisendrath & Company; that the purpose of these organizations was to strip the company of its valuable assets through a friendly receivership, to restrain any action on the part of the bondholders, and to exchange the bonds for other securities, and that on February 13, 1931, they caused the firm of Baer, Eisendrath & Company to be placed in receivership. It is also alleged that thereafter "they" formed a bondholders protective committee for bonds which were not taken into the common law trust.

More specifically, the complaint seeks the removal of Edward G. Felsenthal, Clarence L. Coleman and Mervin K. Baer, as members of the bondholders committee referred to in the bill, and for the appointment of their successors; an accounting by all these defendants for their various acts and doings in the administration

[illegible]

of the various trusts. The bill also prays that these defendants may be held liable for malfeasance and misfeasance in office, that they be required to account for any amounts which the court may find to be due, and that a joint and several judgment may be entered against them. The complaint, also prays for the appointment of a receiver of all the properties, bonds and funds now in the control of the various defendants, whether the "properties" have any relationship to the bonds held by plaintiffs or not. It is also prayed that a temporary injunction be entered during the pendency of the cause to restrain the defendants from proceeding with any foreclosure or reorganization plan, and from encumbering, transferring or assigning "any of the bonds, funds or property" held by them, until the further order of the court; that a construction be had of the terms and provisions of a certain depositary agreement of July 1, 1932, to determine the fairness or unfairness of any of its provisions; that the defendants be compelled to file a complete list of the names of the bondholders interested in any of the properties, and of all the properties which have not been reorganized, and, which it is charged, all the defendants are now attempting to reorganize.

In the bill of complaint there is a general allegation to the effect that the reorganization committee handled various defaulted bond issues secured by separate and distinct mortgages, but, as stated, there is no allegation that there is any community of interest between the owners of bonds in one issue and the owners of the bonds in any other. It is also alleged that exorbitant and illegal fees were charged by this committee in the transaction of certain foreclosure suits, but all these allegations are conclusions, and are not supported by any allegation of fact. Many general allegations

of the [illegible]

may be held [illegible]

they be [illegible]

find to be due, [illegible]

against the [illegible]

receiver of [illegible]

of the [illegible] flows [illegible]

relationship to [illegible]

prayed that [illegible]

of the [illegible]

foreclosure or [illegible]

or assigning [illegible]

until the [illegible]

the terms [illegible]

July 1, 1[illegible], to [illegible]

provisions; in [illegible]

list of [illegible]

properties, and [illegible]

and, which it [illegible]

reorganize.

In the [illegible]

the [illegible] that [illegible]

bond issue [illegible]

stated, [illegible]

between the [illegible]

in any [illegible]

[illegible]

closure suit, [illegible]

not [illegible]

are made of misconduct on the part of the reorganization committee and other defendants, but no specific facts are mentioned in connection with any of these allegations, and the defendants' motion to dismiss was partially based upon the matters herein just before suggested. In addition to the above, the allegation as to misconduct on the part of defendants is a general allegation, and no specific facts are mentioned as to which of the defendants this misconduct may be attributed. The record indicates that there are many owners of outstanding bonds sold by Baer, Eisendrath & Company, which bonds are secured on various separate pieces of real estate. If plaintiffs are right in their position that they can maintain an action of the character of the instant case on behalf of all bondholders concerned, which we doubt, then all parties concerned should be brought into court, not as unknown owners, but specifically, so that not only the claimed rights of plaintiffs may be adjudicated, but the rights of all the other parties. We are also of the opinion that there has been a misjoinder of parties plaintiff. As we read the record, we draw the conclusion that in dismissing the complaint, the court did not intend to and did not hold that the individual plaintiffs had no cause of action. From the maze which we have been compelled to travel through in the bill presented by plaintiffs, we arrive at the further conclusion that the individual plaintiffs may each have a cause of action.

Under these circumstances, the order of the Circuit Court dismissing the bill, is affirmed, without our intending to prejudge the question as to the rights of these plaintiffs or other bondholders to maintain individual suits, or representative suits, as to each separate bond issue. The decree is affirmed.

DECREE AFFIRMED.

HEBEL AND DENIS E. SULLIVAN, JJ. CONCUR.

are made or [illegible]
and other [illegible]
connection with [illegible]
to diagram [illegible]
suggested. In [illegible]
on the part of [illegible]
facts are mentioned [illegible]
may be attributed [illegible]
of contracting [illegible]
are secured on a [illegible]
are right in their [illegible]
character of the [illegible]
which we doubt, [illegible]
court, not as [illegible]
claimed rights of [illegible]
all the other [illegible]
been a misjoinder of [illegible]
draw the conclusion [illegible]
not intend to [illegible]
cause of action. [illegible]
travel through in the [illegible]
further consideration [illegible]
cause of action.

Under the [illegible]
disregarding the [illegible]
the question is to [illegible]
to maintain individual [illegible]
separate bond issue. [illegible]

HELD: [illegible]

40063

HAZEL JOHNSON,

Appellee,

v.

L. H. S. ROBLEE,

Appellant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

56

297 I.A. 644

MR. PRESIDING JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment in the sum of $800.00, entered in the Circuit Court of Cook County in favor of plaintiff, Hazel Johnson, and against defendant, L. H. S. Roblee. The action is predicated upon the following document:

"8/21/26 $800.00
I. O. U. L.H.S. ROBLEE."

It is admitted that on August 21, 1926, defendant borrowed the sum of $800.00 from Waldo P. Johnson, the husband of Hazel Johnson, plaintiff, now deceased, that in the administration of the estate of Waldo P. Johnson, Hazel Johnson, his widow, received the evidence of indebtedness referred to, as a portion of her widow's award, that plaintiff, as the owner and holder of the I.O.U., on October 21, 1935, made demand upon defendant for the payment thereof, and that payment was refused. Johnson died intestate in 1933.

Defendant testified that during the lifetime of Waldo P. Johnson, he and Johnson were associated together in the Live Poultry Transit Company, a corporation, of which Roblee was president and Johnson vice president, that the association between them continued until 1930, and that it was during the time of their business association that defendant signed the document in question. Roblee further testified that the amount which he had borrowed from Johnson, represented by this document, had been paid, and that frequently during Johnson's lifetime, Roblee demanded the document from Johnson. Roblee exhibited a check dated January 17, 1930,

for the sum of $3,437.50, drawn on the Continental Illinois Bank and Trust Company of Chicago, signed by defendant and payable to Waldo P. Johnson. The check was endorsed by Johnson, and the amount represented by the check was apparently paid to Johnson. Further testifying, Roblee stated that the various interests in the Live Poultry Transit Company were as follows: Johnson owned 40%, Roblee 30% and one Roy Argast 30%; that in 1930 the assets of the Live Poultry Transit Company were acquired by the North American Car Corporation, of which the witness Roblee is now president; that in the sale of their properties to the North American Car Corporation, Roblee received the sum of $6,875.00, and that the check for $3,437.50 was given by Roblee to Johnson as Johnson's proportion of the proceeds of that transaction, and that "that agreement and settlement were independent of the $800.00 transaction in 1926." From what we can gather from the testimony of Roblee, it appears that prior to this time, a note for $4,246.00 had been given to the Continental Illinois National Bank and Trust Company for money borrowed for the Live Poultry Transit Company, and that the note was secured by collateral belonging to all of the parties, and that when the note was paid, the collateral which had been posted as security therefor, was distributed between Argast and Roblee, after the amount of this loan was paid. He further testified that the check for $3,437.50 which he gave Johnson "was to close a transaction which he and I had relative to the sale of the assets of the Live Poultry Company to the North American Car Corporation. It showed we had transactions, and the transactions were all cleaned up at the time of that check. We had previously had an accounting. At the time we had this accounting, I knew he had my I.O.U. for $800.00." His testimony was further to the effect that prior to the time when Johnson had agreed to deliver to the witness the

for the sum of [illegible]
and Trust Co. [illegible]
also [illegible]
represented by [illegible]
testifying, believe [illegible]
Poultry Journal [illegible]
Noble Co. and [illegible]
Live Poultry Journal [illegible]
Car Corporation, [illegible]
that in the [illegible]
Corporation, [illegible]
check for $3,427. [illegible]
proportion of [illegible]
ment and settlement [illegible]
1926." [illegible]
appears that [illegible]
to the Continent [illegible]
money borrowed for [illegible]
note was secured [illegible]
that when the note [illegible]
security therefor, [illegible]
the amount of [illegible]
check for $2,427. [illegible]
action which be [illegible]
Live Poultry Journal [illegible]
showed [illegible]
no at the time [illegible]
it the time [illegible]
$20,000." The [illegible]
the time when [illegible]

I.O.U upon which the suit is predicated, Johnson had frequently tried to borrow money from him.

Roblee's testimony to the effect that all the differences between Johnson and Roblee had been settled and determined and a check for a large amount of money given to Johnson by Roblee on account of such settlement, is not denied by any statement or fact, nor by any circumstance in the case. On the contrary, the circumstance that after the execution of the I.O.U on August 21, 1926, and for a period of approximately seven years thereafter and until Johnson's death, no demand is shown to have been made upon Roblee for payment of the alleged debt to Johnson, seems to confirm Roblee's testimony. The record further indicates that after Johnson's death, an administrator was appointed for his estate, that the estate was practically insolvent, and that no demand was ever made by the administrator for the payment of the amount of the I.O.U.

We are of the opinion that plaintiff's right to recover is not established by the manifest weight of the evidence. The judgment of the Circuit Court of Cook County is, therefore, reversed, and the cause is remanded.

JUDGMENT REVERSED AND THE
CAUSE REMANDED.

HEBEL, AND DENIS E. SULLIVAN, J. CONCUR.

I.C.[illegible] on this

tried to [illegible]

[illegible] cases in [illegible] history

between [illegible]

check for [illegible]

account of such [illegible]

nor by any circumstance [illegible]

that after the [illegible]

a period [illegible]

death, no [illegible]

of the alleged [illegible]

The record [illegible]

administrator [illegible]

practically [illegible]

administrator for the [illegible]

[illegible]

is not set [illegible]

judgment of [illegible]

and the [illegible]

HELD, [illegible]

40088

PEOPLE OF THE STATE OF ILLINOIS, on the relation of JOHN V. FARWELL and ARTHUR L. FARWELL,

Petitioners - Appellants,

v.

EDWARD J. KELLY, Mayor of the City of Chicago, GUSTAV A. BRAND, Treasurer of the City of Chicago, R. B. UPHAM, Comptroller of the City of Chicago, BARNET HODES, Corporation Counsel of the City of Chicago, and CITY OF CHICAGO, a Municipal Corporation,

Defendants - Appellees.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

297 I.A. 644

MR. PRESIDING JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order and judgment of the Superior Court of Cook County, denying a petition for a writ of mandamus against the City of Chicago to compel it to pay certain interest alleged to be due on an award in a condemnation proceeding. The judgment denying the writ of mandamus was originally appealed to the Supreme Court upon the theory that a constitutional question is involved. The Supreme Court transferred the cause to this court, and in an opinion filed in the cause on February 16, 1938, (People ex rel. John V. Farwell, et al., v. Edward J. Kelly, et al., 368 Ill. 164), the Supreme Court held that no constitutional question is involved, and, as we construe the opinion, also held that the petitioner is entitled to the writ of mandamus, as prayed.

The judgment of the Superior Court of Cook County denying the writ is, therefore, reversed, and the cause is remanded with the direction that the Superior Court issue the writ of mandamus as prayed in the petition.

REVERSED AND REMANDED
WITH DIRECTIONS.

HEBEL AND DENIS E. SULLIVAN, JJ. CONCUR.

40056

DOMESTIC ENGINEERING COMPANY, a corporation,
(Plaintiff) Appellee,
v.
INSTITUTIONAL PUBLICATIONS, INC., a corporation, et al.,
(Defendants) Appellants.
On Appeal of WESTERN NEWSPAPER UNION,
(Defendant) Appellant.

APPEAL FROM
CIRCUIT COURT
COOK COUNTY.

297 I.A. 644

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

The Western Newspaper Union, a corporation, one of the defendants, appeals from a decree entered granting a permanent injunction in the equity proceeding instituted by the Domestic Engineering Company against Institutional Publications, Inc., and this defendant, which decree restrains Institutional Publications, Inc. and the Western Newspaper Union from "printing and manufacturing publishing or distributing any publication under the name 'Institutional Outfitter', 'Institutional Jobber', or any other name or title similar thereto, or from soliciting or procuring subscriptions to or advertisements for any such publication." The decree further enjoined the defendants from withholding from the plaintiff any assets "essential to the publication of future issues of the 'Institutional Outfitter' as a going publication", and "from in any manner unfairly dealing with the former or prospective subscribers, advertisers or readers of 'The Institutional Outfitter'."

The action below was started by a complaint in equity file by the plaintiff seeking an injunction. Answers were filed by the Institutional Publications, Inc. and the Western Newspaper Union, a corporation. After a hearing before a Master, the Master's report was filed and the decree entered, and it is from this decree that the Western Newspaper Union appeals. The other defendant is not appealing from the decree entered by the court.

DONATIO [illegible]
corporation,
(an artist) [illegible]

v.

INSTITUTIONAL [illegible]
corporation, et al.,

(Denver Div.) [illegible]

On appeal of [illegible]

(Waterman) [illegible]

v. [illegible]

The [illegible]

defendants, [illegible]
injunction in the [illegible]
Engineering Company [illegible]
this defendant, [illegible]
Inc. and the Western [illegible]
publishing or distributing [illegible] the page
'Institutional Outlier', [illegible] by [illegible]
name or title similar thereto, [illegible]
solicitations to or [illegible] tion.' The
decree further enjoined the [illegible] from the
plaintiff may create [illegible]
of the 'Institutional [illegible]', and from
in any manner unfairly [illegible]
solicitors, advertising or [illegible]

The action [illegible] by the
by the plaintiff [illegible]
institutional [illegible]
a corporation, [illegible]
the filer and the [illegible]
the Western Home [illegible]
appealing from the [illegible]

It appears from the facts that the Western Newspaper Union's connection with the dispute in question between the plaintiff and the Institutional Publications, Inc. is as a printer employed by the Institutional Publications, Inc. to do its printing, and who had been printing "The Institutional Outfitter" and other magazines for the Institutional Publications, Inc.

The Institutional Publications, Inc. had purchased "The Institutional Jobber" on the installment plan, by virtue of a contract with the plaintiff in this action.

It also appears from the facts that the Institutional Publications, Inc., one of the defendants, notified the plaintiff, as it had a right to do under the terms of the contract, that it would not complete the purchase, but would terminate the contract and returned the magazine on February 15, 1937. Thereafter the Institutional Publications, Inc. delivered to the defendant printing company materials for printing the "The Institutional Jobber", and the defendant, Western Newspaper Union did the printing.

It also appears that after a hearing before the master and the filing of his report, the trial court held that the Institutional Publications, Inc. was guilty of unfair competition in refusing to deliver the assets of "The Institutional Outfitter" to the plaintiff, of attempting to palm off "The Institutional Jobber" as "The Institutional Outfitter", and of using some of the assets of "The Institutional Outfitter" in publishing "The Institutional Jobber".

The court further found that the allegations contained in the bill of complaint filed are true, and entered a decree granting an injunction against the defendants. As we have indicated, the appeal is taken by the Western Newspaper Union and not joined in by the Institutional Publications, Inc.

For a period of eighteen months immediately prior to February 15, 1937, Institutional Publications, Inc., a corporation,

It appears from the [illegible]

Union's connection with [illegible]

tiff and the institution [illegible] which

employed by the institution [illegible]

and who had been activ[illegible]

magazines for the Insti[illegible] in

The Insti[illegible] "[illegible] the

Institutional Lobster" [illegible] writer of a

contract with the plaintiff [illegible]

It also appears that [illegible] institutional

Publications, Inc., one [illegible] the Institutional

as it had a right to do under [illegible] contract, that it

would not complete the [illegible] terminate the contract

and returned the magazine [illegible]

Institutional Publications, Inc. [illegible] the defendant writing

company materials for [illegible] "Institutional Lobster", and

the defendant, [illegible] the writing.

It also appears [illegible] writing before the market and

the filing of his report, [illegible] that the Institutional

Publications, Inc. [illegible] competition in refusing to

deliver the magazine of "the Insti[illegible] Critter" to the plaintiff,

of attempting to [illegible] "Institutional Lobster" as "The

Institutional Critter", [illegible] of the masks of "the

Institutional Critter" [illegible] "Institutional Lobster".

The court [illegible] in the plaintiff's [illegible]

in the bill of complaint [illegible] and entered a decree granting

an injunction against the [illegible] as no more injurious, the

appeal is taken by the [illegible] or which was not joined in by

the Institutional Publications, Inc.

For a period of six months immediately prior to

February 15, 1927, Institutional Publications, Inc., corporation,

engaged in publishing various magazines, had been publishing a magazine called "The Institutional Outfitter" under a contract between the Domestic Engineering Company, a corporation, and the defendant, Institutional Publications, Inc. for the sale of the magazine by the plaintiff to this defendant. The magazine as described in that contract and as published by Institutional Publications, Inc. was called "The Outfitter", but the name had later been changed by the Institutional Publications, Inc. to "The Institutional Outfitter". In accordance with the terms of the contract, this defendant, after giving the plaintiff the required 30 days notice, elected to and did terminate the contract and, as contended, ceased publishing the magazine, and delivered it to the plaintiff. Thereafter, the Institutional Publications, Inc. began the publication of a magazine called "The Institutional Jobber", which name had been acquired by Institutional Publications, Inc. by purchase from Ahrens Publishing Company. The plaintiff thereafter filed suit for an injunction, alleging that the Institutional Publications, Inc. had not turned back to the plaintiff all property and assets of "The Institutional Outfitter", but had retained and was using them in publishing the new magazine, and alleging unfair competition and conspiracy.

The plaintiff contends that the statement of facts set forth in defendant's brief does not adequately inform the court as to what actually took place between the plaintiff and the other defendants, and points to the fact that the original publication involved in this litigation was started by the plaintiff sometime prior to August, 1935, and was called "The Outfitter". It was then being published by the plaintiff and printed by the Printing Products. At this time, the Institutional Publications, Inc. was publishing a magazine known as Hospital Management, which was printed for them

engaged in [illegible]
magazine called "[illegible]
between the [illegible]
defendant, Institution[illegible]
magazine by the [illegible]
described in [illegible]
tions, Inc. was [illegible]
changed by the [illegible]
Outfitter". In [illegible]
defendant, after [illegible]
elected to and did [illegible]
publishing the [illegible]
after, the Institution [illegible]
a magazine called "[illegible]
acquired by Institution [illegible]
Publishing Company. [illegible]
injunction, alleging [illegible]
not turned over to the [illegible]
Institutional Outfitter [illegible]
publishing the [illegible]
conspiracy.

The plaintiff [illegible]
forth in paragraphs [illegible]
to what actually took [illegible]
defendants, [illegible]
involved in this [illegible]
prior to August, [illegible]
being published by [illegible]
At this time, the [illegible]
a magazine known [illegible]

by the Western Newspaper Union. As a result of the negotiations, the publication known as "The Outfitter" was sold to the Institutional Publications, Inc. under a conditional sales contract.

The plaintiff in this action contends that the findings of the master, approved by the chancellor, are not to be disputed unless manifestly against the weight of the evidence, and points to the master's finding as Item "Twelfth" wherein the master states:

> "That defendant, Western Newspaper Union, a corporation, printed The Institutional Outfitter for defendant, Institutional Publications, Inc., a corporation; on February 1, 1937, plaintiff notified the Western Newspaper Union, a corporation, that The Institutional Outfitter had reverted back to plaintiff and that said Western Newspaper Union, a corporation, was to hold, for the benefit of plaintiff, everything in its possession pertaining to The Institutional Outfitter; at that time Western Newspaper Union, a corporation, had in its possession certain materials, cuts and copy which Quinn, publishing sales manager of said company, thought was to be used for the February, 1937 issue of The Institutional Outfitter. The fact is that up until the 8th or 10th day of February, 1937, Quinn was still preparing to put out the February, 1937 issue of The Institutional Outfitter and had actually made proofs of advertisements to be used for said issue."

and also to the further finding of the master as Item "Twenty-second", as follows:

> "That the defendant, Western Newspaper Union, even after receiving notice from the plaintiff that the publication had reverted to plaintiff, used the material which had been prepared for the 'Outfitter' in printing the February, 1937 and subsequent issues of the 'Jobber'."

and in conclusion the finding of the master -

> "That the allegations of the complaint in chancery were substantially true and had been duly sustained by the evidence; that the equities of the case are with the plaintiff, Domestic Engineering Company, a corporation, and against the defendants, Institutional Publications, Inc., a corporation and Western Newspaper Union, a corporation; and that the plaintiff is entitled to the relief prayed."

There seems to be no dispute as to the fact of the plaintiff's giving notice to the defendant, Western Newspaper Union, that "The Institutional Outfitter" had reverted to the plaintiff and that said defendant was to hold for the benefit of the plaintiff everything in its possession pertaining to "The Institutional Outfitter"; that

by the Eastern Management [illegible] publication known as "The [illegible] Institutional Publications, Inc. [illegible]

The plaintiff in this [illegible] the master, approved by the [illegible] manifestly against the weight [illegible] master's finding as [illegible]:

> "That defendant, [illegible] printed The Institutional [illegible] Publications, Inc., a [illegible] notified the Eastern Management [illegible] Institutional Outfitter [illegible] said Eastern Management [illegible] benefit of plaintiff, [illegible] to The Institutional Outfitter [illegible] Union, a corporation, [illegible] cute and copy which [illegible] company, thought was to be [illegible] The Institutional Outfitter, [illegible] or 10th day of February, 1[illegible] out the February, 1[illegible] had actually made proofs of [illegible] issue."

and also to the Turbo [illegible] as follows:

> "That the defendant, [illegible] receiving notice from the [illegible] revested to plaintiff, [illegible] for the 'Outfitter' in [illegible] issues of the 'Jobber'."

and in conclusion the Court [illegible] -

> "That the [illegible] substantially true [illegible] that the equities of the [illegible] Engineering Company, [illegible] Institutional Publications, [illegible] Newspaper Union, [illegible] to the relief prayed."

There seems to be [illegible] of the plaintiff's living notice [illegible] "The Institutional Outfitter" was revested to the plaintiff and that said defendant [illegible] in its possession [illegible] Outfitter"; that

Frank J. Quinn, publishing sales manager of the Western Newspaper Union, testified that he personally talked with Mr. Hansen, who is connected with the plaintiff, over the telephone regarding the letter written by the plaintiff to the defendant, which is set forth as Plaintiff's Exhibit 1. Quinn's testimony establishes that this letter was received as the master found; in fact there is no dispute as to this item of evidence, and it appears from the record that the Western Newspaper Union had in its possession certain materials, cuts and copy which Quinn thought were to be used for the February, 1937 issue of "The Institutional Outfitter", and this witness testified that the material used in the February, 1937 issue of "The Institutional Jobber" was in the hands of the defendant, Western Newspaper Union, before February 15th, and the evidence seems to be clear that up until the 8th or 10th of February, it was assumed by the witness Quinn that the Western Newspaper Union was preparing to go ahead and print "The Institutional Outfitter."

It is to be noted that the defendant Institutional Publications, Inc. does not appeal and the findings of the master, approved by the chancellor, regarding Institutional Publications, Inc. remain undisputed, and it is suggested by the plaintiff that these findings determine that the Institutional Publications, Inc. wrongfully schemed to prevent "The Institutional Outfitter" from being issued in February, 1937, and thereby led the advertisers and subscribers to believe that "The Institutional Jobber" was one and the same paper as "The Institutional Outfitter"; that "The Institutional Jobber" was mailed to the same parties who had theretofore been receiving "The Institutional Outfitter" and these people not receiving any February, 1937, issue of "The Institutional Outfitter" and noticing that the ownership, management and editorial staffs of "The Institutional Jobber" which they did receive were identical with

Frank G. [illegible]

union, that [illegible]

is so [illegible]

letter [illegible]

forth as [illegible]

this letter [illegible]

dispute [illegible] to this [illegible]

that the [illegible]

materials, [illegible]

the [illegible]

witness [illegible]

of "The [illegible]

[illegible]

to be [illegible]

assumed by the [illegible]

proposing [illegible]

It is [illegible]

Public [illegible]

approved by the [illegible]

Inc. [illegible]

these [illegible]

[illegible]

being [illegible]

subscribing [illegible]

the [illegible]

tional [illegible]

[illegible]

[illegible]

and [illegible]

"The [illegible]

the respective staffs of the prior issues of "The Institutional Outfitter", naturally assumed that "The Institutional Jobber" was merely a continuation of "The Institutional Outfitter", and it necessarily follows that the defendant Institutional Publications, Inc. was guilty of unfair competition in palming off "The Institutional Jobber" as "The Institutional Outfitter" and deceiving the subscribers and advertisers of the latter, to the irreparable injury of the plaintiff.

We quite agree with the contention of the plaintiff that the circumstances show that the defendant Western Newspaper Union actively took part in this scheme of the defendant, Institutional Publications, Inc. and conspired with it in unlawful competition with the plaintiff to palm off "The Institutional Jobber" as "The Institutional Outfitter".

It is interesting to note that the February issue of "The Institutional Jobber" was printed and mailed by the Western Newspaper Union for the Institutional Publications, Inc. and was almost an exact duplication of the previous issues of "The Institutional Outfitter", in that it had the same sort of type, feature material and general style lay-out, and in printing the first issue of "The Institutional Jobber", the plaintiff contends that the Western Newspaper Union used part of the same type that had been used in "The Institutional Outfitter", resetting that which was necessary to change the name, that many of the advertisements appearing in "The Institutional Jobber" were from cuts originally delivered to Institutional Publications, Inc. for "The Institutional Outfitter" or were originally proofed for the "Institutional Outfitter" by the Western Newspaper Union. The cover plate was the same, the size and paper used was identical, the names of the editorial staff and circulation manager were identical; the feature material appeared in the same

the [illegible]
Outfitter", [illegible]
merely a [illegible]
necessarily [illegible]
Inc. was guilty of [illegible]
tional Jobber" [illegible]
authorities and [illegible]
injury of the plaintiff.

[illegible]
the circumst[illegible]
actively took [illegible]
Publications, Inc. [illegible]
the plaintiff to [illegible]
Institutional Outfitter".

It is [illegible]
Institutional Jobber [illegible]
Union for the [illegible]
exact duplication of [illegible]
Outfitter", in [illegible]
and general style [illegible]
Institutional Jobber, [illegible]
Newspaper Union [illegible]
Institutional Outfitter [illegible]
change the name, [illegible]
Institutional Jobber [illegible]
tional Publications [illegible]
originally proofed [illegible]
Newspaper Union. [illegible]
used the identical, [illegible]
manager are identical [illegible]

manner, the type was the same, and in each publication there were departments called "New Building Projects", "Salesman Wanted", "Information on where to buy it", "House Ads", and it is contended that the forms which had been used in previous issues of "The Institutional Outfitter" were retained by the Western Newspaper Union and used for "The Institutional Jobber". It is further contended, and there was no denial, that the Western Newspaper Union mailed out "The Institutional Jobber" to a mailing list that was, if not identical, at least inclusive, of the mailing list that had been used for prior issues of "The Institutional Outfitter".

This is what has been charged and there is evidence to support the facts as related and suggested by the litigants in this proceeding.

The allegations of plaintiff's bill and the proofs indicate that the court was fully justified in sustaining the master's report.

There is a question as to whether there really was a conspiracy to do the acts complained of and called to our attention in the briefs of the parties.

From the facts as related, the Western Newspaper Union joined with the Institutional Publications, Inc., and consented and agreed to carry out a scheme of unfair competition. In other words, to palm off "The Institutional Jobber" as "The Institutional Outfitter", and to deprive the plaintiff of its business. From the evidence the court undoubtedly felt justified in entering the decree whereby it enjoined the defendant Western Newspaper Union, its officers, agents and employes, "from in any manner unfairly dealing with the former or prospective advertisers, subscribers or readers of 'The Institutional Outfitter'."

In order to sustain the injunction against the Western Newspaper Union, it is not necessary for the plaintiff to allege

or establish any conspiracy with the admitted wrongdoer, Institutional Publications, Inc. The defendant, Western Newspaper Union, admittedly printed and mailed the publication "The Institutional Jobber" for the defendant Institutional Publications, Inc. Thus the case is nearly identical with Andrew Jergens Co. v. Bonded Products Corporation, 13 F. (2d) 417, which has been called to our attention by the plaintiff. This was a bill for an injunction to restrain the defendant from unfairly competing with the plaintiff by the alleged misuse of the word "Woodbury" upon toilet soap, and alleged imitation of plaintiff's wrappers. The opinion of the court says:

> "It seems to me, therefore, that in deciding the rights of the parties it is not improper to say that, if the plaintiff can stop Woodbury from doing certain things, it can also stop defendant from doing those things for Woodbury. Saxlehner v. Eisner, 179 U. S. 19, * * * Nims, Unfair Competition, (2d Ed.) 667."

This case was appealed to the Circuit Court of Appeals for the Second Circuit and appears there under the same name in 21 F. (2d) 419.

> "The defendant also argues that it is not responsible for deception which may be practiced in the sale of the soap because it merely manufactured it for William A. Woodbury. Defendant knew, however, that plaintiff manufactured and sold 'Woodbury's Facial Soap'. If, therefore, the soap as wrapped and delivered by defendant to Woodbury or on his order is likely to deceive the ultimate purchasers and come into unfair competition with plaintiff's product and does do so, we have no doubt that defendant is liable as a contributory infringer. N. K. Fairbank Co. v. Bell Mfg. Co. 77 F. 869, 878 (C.C.A. 3); * * * Wolf Bros. and Co. v. Hamilton-Brown Shoe Co., 206 F. 611 (C.C.A.); * * * Warner & Co. v. Lilly & Co., 265 U. S. 526, 530; * * * Nims, Unfair Competition, (2d Ed.) 667."

The language we have quoted from this authority is applicable to the case before us, for it appears from the evidence that the Western Newspaper Union knew that the magazine "The Institutional Jobber" as printed, wrapped and mailed by the defendant Western Newspaper Union upon the order of Institutional Publications, Inc. was likely to deceive the ultimate subscribers and advertisers and come into unfair competition with the plaintiff's magazine "The Institutional Outfitter".

It is suggested by the defendant, Western Newspaper Union

or establish any [illegible]

tional Publications, Inc., [illegible]

admittedly private [illegible]

lobber" for the defendant [illegible]

case is merely incidental. [illegible]

Corporation, 12 S. (2d) 412, [illegible]

by the plaintiff. This [illegible]

the defendant from [illegible]

alleged abuse of the [illegible]

imitation of plaintiff's [illegible]:

> "It seems to me, [illegible]
> of the petition it is not [illegible]
> can stop soliciting from [illegible]
> defendant from [illegible]
> Blamey, 172 [illegible]
> 887."

This case is a [illegible]

Second Circuit [illegible] (58)

412.

> "The defendant [illegible]
> deception when [illegible]
> it merely [illegible]
> knew, however, that [illegible]
> racial hoax'. It, therefore,
> by defendant to [illegible]
> the ultimate [illegible]
> plaintiffs [illegible]
> defendant is liable as a [illegible]
> Co. v. Hall [illegible] 4d, [illegible]
> and Co. v. Publications, [illegible]
> Warner & Co. v. Hill & [illegible]
> Unfair Competition, [illegible]

The language [illegible]

the case before [illegible]

Newspaper [illegible]

printed, [illegible]

upon the order of [illegible]

deceive the [illegible]

competition with [illegible]

It is [illegible]

that plaintiff's theory of this case is that the Western Newspaper Union conspired with the Institutional Publications, Inc. in connection with its alleged unfair trade practice, and alleged refusal to deliver all of the assets of "The Institutional Outfitter" to the plaintiff. It is claimed that the evidence shows affirmatively, however, that no conspiracy existed and that Western Newspaper Union's only action consisted in printing "The Institutional Jobber" in the form and manner instructed by the publisher. Nor did the Western Newspaper Union have in its possession any of the assets belonging to "The Institutional Outfitter", and it points to the record, which shows that for eighteen months immediately prior to February 15, 1937, Institutional Publications, Inc., a corporation, engaged in publishing various magazines, had been publishing a magazine called "The Institutional Outfitter" under a contract between the plaintiff and Institutional Publications, Inc. for the sale of the magazine by the former to the latter. The magazine was described in that contract and as published by Institutional Publications, Inc. was called "The Outfitter", but the name had later been changed by the Institutional Publications, Inc. to "The Institutional Outfitter". In accordance with the terms of that contract, the Institutional Publications, Inc. after giving the plaintiff the requisite 30 days notice, elected to and did terminate the contract, and then began the publication of a magazine called "The Institutional Jobber", which name had been acquired by the Institutional Publications, Inc. by purchase from Ahrens Publishing Company. Plaintiff then filed the suit for an injunction referred to above, alleging that the Institutional Publications, Inc. had not turned back to the plaintiff all property and assets of "The Institutional Outfitter" but had retained and was using them in publishing the new magazine, and alleging unfair competition and conspiracy.

that plaintiff's theory [illegible]
Union conspiracy [illegible]
connection with its [illegible]
refusal to deal[illegible]
to the plaintiff. [illegible]
tively, however, [illegible]
paper Union's only [illegible]
lobbyer" in the form [illegible]
did the Western [illegible]
assets belonging to [illegible]
to the record, which [illegible]
to February 15, 1957, [illegible]
engaged in publishing [illegible]
magazine called "[illegible]
the plaintiff [illegible]
the magazine by the [illegible]
in that court of [illegible]
was called "the [illegible]
the International [illegible]
In accordance with the [illegible]
Publications, Inc. [illegible]
notice, alleged to [illegible]
publication of a [illegible]
made had been acquired by [illegible]
purchase from [illegible]
suit for an injunction [illegible]
tional Publications, [illegible]
property and assets [illegible]
and was using them [illegible]
unfair competition [illegible]

In the statement offered by the Western Newspaper Union it is recited that it is a printer, not a publisher; that it was not a party to the contract between the plaintiff and the Institutional Publications, Inc. It contends that it had no connection whatever with the business dealings of the plaintiff and the Institutional Publications, Inc., defendant; that the Western Newspaper Union's sole connection in the dispute between the plaintiff and the Institutional Publications, Inc. was that Western Newspaper Union, as printer, was employed by Institutional Publication, Inc. to do its printing, and as such it had been printing "The Institutional Outfitter" and other magazines for Institutional Publications, Inc., and not until the filing of the instant suit did the Western Newspaper Union know what the contract between the plaintiff and the Institutional Publications, Inc. contained.

These facts are referred to herein before, but in order to have before us the theory of the defendant's defense it is necessary to repeat to a certain extent what we said in the statement of facts.

The question involved in this case is largely one of fact, and the facts as they appear in the record are conflicting. The court was called upon to pass upon the facts and consider them together with the law in order to determine whether the plaintiff had established its case by a preponderance of the evidence. It would not add anything to this opinion to repeat the facts, but it is apparent that the purpose of the publication of "The Institutional Jobber" was to deceive those persons who had formerly considered the magazine "The Institutional Outfitter" for the purpose for which it was published, and as we have previously stated in this opinion, several facts show that the publication was, in a large measure, an imitation of the magazine sold to the defendant Institutional Publications, Inc. When we consider all the items presented, we

[illegible]

it is problem what is [illegible]
not a party to the [illegible]
tional publications, Inc. [illegible]
whatever with the [illegible]
tional Publications, [illegible]
Union's sole [illegible]
the Institutional [illegible]
Union, as trustee, [illegible]
to do its printing, and [illegible]
tional outfitter" and other [illegible]
Inc., and not until [illegible]
Newspaper Union and [illegible]
the Institutional [illegible]

These [illegible]
to have before us the [illegible]
necessary to refer to [illegible]
ment of facts.

The question [illegible]
and the facts as they [illegible]
court was called [illegible]
together with the [illegible]
had established [illegible]
would not add anything [illegible]
is apparent that [illegible]
"Jobber" was to [illegible]
the magazine "The Institutional Outfitter" [illegible]
it was published, [illegible]
several facts [illegible]
an Amendment of the [illegible]
Publications, Inc. [illegible]

believe the court was fully justified in granting the injunction in this case, and that it is sustained by the proof. The final order entered by the court therefore is sustained and the decree granting the permanent injunction is affirmed.

DECREE AFFIRMED.

HALL, P.J. AND DENIS E. SULLIVAN, J. CONCUR.

believe the court [illegible] fully just[illegible] in this case, and [illegible] order entered by the court [illegible] granting the permanent injunction [illegible]

HALL, P.J. AND DAVIS [illegible]

40138

LLOYD F. BANKER, (Plaintiff) Appellant, v. PACKARD MOTOR CAR COMPANY OF CHICAGO, a corporation, (Defendant) Appellee.	APPEAL FROM SUPERIOR COURT COOK COUNTY.

297 I.A. 645

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This is an appeal by the plaintiff from a judgment for the defendant entered upon a verdict directed by the court. The plaintiff sought to recover damages suffered in a personal injury action in which the plaintiff sued the defendant for an alleged lead poisoning due, as he claims, to a faulty second-hand automobile which the defendant sold to him. The case was tried before the court and a jury.

The plaintiff alleges that on or about December 1, 1932, he bought from the defendant a second-hand automobile, and that a warranty was entered into between the parties as follows:

> "Guaranteed Packard Exchanged Vehicles are warranted for 30 days after date of delivery. This warranty being limited to the furnishing at our service station of such parts of the vehicle as shall under normal use and service appear to us to have been defective in material and workmanship. No warranty whatever is made in respect to tires, springs, coils, batteries or accessories. No warranty is made or authorized to be made by us or any of our employees other than herein set forth."

The plaintiff further alleges, as we have indicated, that he purchased a second-hand automobile and made payment therefor and proceeded to use it; that the defendant told him he should use ethyl gasoline in the tank and that he used such gas; that such gas contained tetra ethyl lead, which is poisonous when vaporized and inhaled, of which fact the plaintiff was ignorant.

It is further alleged that as soon as the plaintiff bought the car and began to drive it he noticed the odor of gasoline when the motor was cold and when the motor became hot there was an odor of gas which caused the plaintiff to have a headache and feel bad,

and thereupon the plaintiff went to the defendant and called the attention of the defendant to the fact that there was a leak in the heater or exhaust which was affecting him so that he had a headache; that the defendant by its servant went out with the plaintiff and drove about with him and after purporting to have made an examination said there was no leak, whereupon the plaintiff again took the car and drove it for a few days and the gas continued to leak into the car, making him feel bad and giving him a headache, and he again took the car back to the defendant and called the agent's attention to the fact that there was a defect in the exhaust or heater or in some other part whereby fumes were leaking into the automobile, and again the defendant by its agent informed the plaintiff that there was no leak and that it was all right to use the automobile; that the plaintiff kept on using the car, keeping the windows open, but gas continued to leak into the car; that the plaintiff did not know or realize that the gas leaking into the car was deleterious or harmful.

From the facts offered in support of the complaint filed by the plaintiff it appears that the defendant sold the plaintiff a guaranteed second-hand Packard Motor Car, and that the car had a heater which consisted of a cylindrical device placed in the exhaust line of the automobile; that the heat came through the registers in the floor of the car in front and rear; that the plaintiff as soon as he drove the car found there came from the heater fumes which made him sick; that he on two or more occasions called the attention of the defendant's service station attendants to the fact that the fumes were leaking through the registers; that after purported examinations the defendant told him there was no leak; that the plaintiff continued to use the car for less than a month, and ultimately became very ill; that he developed a complete paralysis and could not move his body for months and was under treatment for

and thereupon the plaintiff went to [illegible] the
attention of the defendant to the fact that there [illegible] an the
heater or exhaust which was [illegible] defendant;
that the defendant by its servants [illegible] and
drove about with him and [illegible] on examination
said there was no leak, [illegible] in the car
and drove it for a few [illegible] leak into the
car, making his feet wet [illegible] in
took the car back to the [illegible]
to the fact that there [illegible] or in
some other part whereby fumes were leaking into it [illegible],
again the defendant by its agent insisted [illegible] there
was no leak and that it [illegible] right to use the [illegible]; that the
plaintiff kept on using the car, [illegible]
continued to leak into the car; but the [illegible] or
realize that the gas escaping into the car [illegible] or harmful.

From the facts offered in [illegible] that filed
by the plaintiff it appears that the [illegible] plaintiff a
guaranteed second-hand Studard Motor Car, and when the car had a
heater which consisted of a cylindrical device placed in the exhaust
line of the automobile; that the heat over [illegible] in
the floor of the car in front [illegible] so soon
as he drove the car found there [illegible] which
made him sick; that he on the car once [illegible] attention
of the defendant's service [illegible] the
fumes were leaking through the [illegible]
examinations the defendant [illegible]
plaintiff continued to use the car [illegible]
ultimately became very ill; [illegible] paralysis
and could not move his body [illegible] treat for

a long period of time; that at first the attending doctor could not diagnose the condition and sent him to the Illinois Research Hospital because he could not fathom it; that the physicians finally found he was suffering from lead poisoning.

The plaintiff's theory is that the defendant sold him a second-hand car and warranted it for 30 days; that he used the car for less than one month; that he was told he could use only ethyl gasoline in the car and did use only that type of gas; that such gas contains lead and when vaporized or broken into fumes is poisonous and particularly so when inhaled; that, as suggested in the statement of facts, the plaintiff told the defendant's service station employes a short time after he began to drive the car that the heater leaked and that the fumes made him sick; that he was assured it was all right; that he reported to them on other occasions and was told the car was all right; that within three weeks from the date of purchase he suffered acute lead poisoning; that there was evidence of doctors to the effect that he suffered from this, which brought about his unhealthy condition.

The point we regard as important is whether the defendant sold the plaintiff a guaranteed second-hand Packard automobile and as a result of the use of this car gas escaped affecting the health of the plaintiff, and whether the court was justified in directing the jury to find for the defendant.

Upon the trial of the case the court considered defendant's motion for a directed verdict at the close of the plaintiff's case, so that we do not have before us evidence other than that offered by the plaintiff.

What do we understand by a guaranteed article when we buy one for use? The courts have passed upon this question and in this case we are obliged to consider their holding, that is, that an automobile of itself is not a dangerous article unless the mechanism

a long period of time; that [illegible]
diagnose the condition [illegible]
Doctors not use be could [illegible]
found be the [illegible]

The [illegible]
second-hand [illegible]
for less than one [illegible]
gasoline in the [illegible]
gas cost the [illegible]
poisonous [illegible]
the statement [illegible]
station employs [illegible]
the be for [illegible]
assured it [illegible]
and was told the [illegible]
late of purchase [illegible]
evidence of [illegible]
brought [illegible]

The [illegible]
said the [illegible]
is a result [illegible]
of the [illegible]
the jury [illegible]

Upon [illegible]
motion for a [illegible]
so the [illegible]
the [illegible]

[illegible]
one for [illegible]
case we are [illegible]
[illegible]

is not properly constructed or connected so as to prevent the escape of gases into what we understand to be a "closed car". There is evidence by the plaintiff that he used ethyl gasoline, and that this was done at the suggestion of the defendant's representative.

We are of the opinion that the question is whether the defendant, each time the plaintiff delivered the automobile to the defendant for adjustment to prevent the escape of gas into the car, advised the plaintiff that the car was all right; in other words, assured the plaintiff that the mechanism of the car was connected so that no gas could escape. The argument of the defendant is that the evidence was not sufficient to establish this fact. However, as we regard the record, this was a question for the jury, and upon this question and others there was sufficient evidence to justify the submission of the case to the jury.

The plaintiff calls our attention to the rule of law stated in Corpus Juris, Negligence, 45, 888, in these words:

> "It is universally recognized that a manufacturer or seller of an article which is inherently and imminently dangerous to human life or health, or which although not dangerous in itself becomes so when applied to its intended use in the usual and customary manner, is liable to any person whether the purchaser or a third person, who, without fault on his part, sustains an injury which is the natural and proximate result of negligence in the manufacture or sale of the article."

There is evidence that the plaintiff was induced to continue the use of the automobile by the statement of the defendant's representative that the car could be used, and that upon two other occasions after the defendant's attention had been called to the leak and an examination made, the plaintiff was assured he could use the car, and of course having been so advised he did so and suffered the unhealthy condition complained of.

The defendant contends that the plaintiff was guilty of contributory negligence in using the car after he knew there was a leak and that he was being affected by it as described in his testimony.

is not properly construed [illegible]

escape of gases into [illegible]

is evidence on the [illegible]

this was done at the [illegible]

[illegible]

defendant, on the [illegible]

defendant for [illegible]

advised the plaintiff [illegible]

assured the [illegible]

so that no gas could [illegible]

the evidence [illegible]

as we regard the [illegible]

upon this question [illegible]

justify the admission of [illegible] to the [illegible]

The [illegible]

stated in Corpus Juris [illegible]

> "It is [illegible]
> seller of [illegible]
> dangerous to human [illegible]
> dangerous in itself [illegible]
> use in the usual [illegible]
> whether the [illegible]
> his part, authorize [illegible]
> result of negligence [illegible]

There is [illegible]

continue the use [illegible]

representative [illegible]

occasions after [illegible]

look and an [illegible]

use the car, and [illegible]

suffered the [illegible]

The defendant [illegible]

contributory negli[illegible]

a case and that [illegible]

testimony.

The fact that the plaintiff was induced to use the car after he was told by the defendant that upon an examination the defendant found nothing wrong with the mechanism of the car, should have been submitted to the jury and we are hesitant to express our views on the evidence. The court in directing a verdict seemed to rely somewhat upon contributory negligence, but as we have stated, we believe the court erred in directing the jury to find a verdict for the defendant.

Other points have been raised, but in view of the fact that the cause is to be retried and submitted to a jury we are of the opinion that it is unnecessary to consider them.

For the reasons stated the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

HALL, P.J. AND DENIS E. SULLIVAN, J. CONCUR.

The [illegible]

after he was tried by [illegible]

defendant to at [illegible]

have been [illegible]

our views on the [illegible]

to rely somewhat [illegible]

stated, we believe [illegible]

verdict for the [illegible]

Other points [illegible]

that the cause is [illegible]

the opinion thus [illegible]

[illegible]

cause remanded.

HALL, J.J. AND [illegible]

40152

GEORGE W. LUCK for the use of META BOS, (Plaintiff) Appellee, v. G. W. LUCK, Inc., a corporation, (Defendant-Garnishee), Appellant.	)	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This is an appeal by the garnishee defendant, a corporation, from a judgment entered against it in the Municipal Court for $790.72 in favor of the plaintiff, being the full amount of the judgment against the original defendant. The garnishee answered "No funds" and upon a hearing of a motion for a new trial, the court modified the judgment against the garnishee defendant by remitting $85.72.

Plaintiff-garnishee obtained a judgment on a real estate mortgage bond dated March 1, 1929, for $500 with interest due thereon subsequent to March 1, 1931. Judgment was entered against the defendant, George W. Luck on the 8th day of November, 1937, upon which judgment garnishment proceedings were instituted against G. W. Luck, Inc., a corporation. Upon a contest of its answer, a hearing was had and the judgment was entered on January 27, 1938.

Upon the hearing of a motion for a new trial on February 24, 1938, George W. Luck was called as a witness and stated that the value of the property transferred was $300, $400 or $500; that he did not remember testifying to the value upon the previous hearing; that in the articles of incorporation of the garnishee the value of the property was taken at $14,000, which included good will. A copy of the articles of incorporation is in the record, showing incorporation on March 10, 1930, for $30,000; that $15,000 of

stock was issued, of which $200 was paid in cash and $14,800 was paid by the "good will, all merchandise, machinery, benches, equipment, two wall cases, typewriter, desk and table now constituting the business of G. W. Luck, located at 25 North Dearborn Street, Chicago, Illinois", and at the conclusion of the hearing judgment was entered, from which the defendant corporation appeals.

The plaintiff in this action moved this court to strike from the record the report of the proceedings upon the garnishee's motion for a new trial. It appears from the suggestions made by the plaintiff;

> "1. That appellant specified in the praecipe for record filed in said cause a report of the proceedings at the trial, but failed to file such report in accordance with the rules of this court in such case provided.
>
> 2. The report of a proceedings included in the record pertains only to the garnishee's (appellant's) motion for a new trial."

It is clear that the garnishment proceedings were heard by the court, and after hearing the evidence offered, a judgment was entered on January 27, 1938; that no report was filed of the hearing had before the court upon which this judgment was entered. Subsequently, upon the garnishee's (defendant) motion for a new trial certain witnesses testified to facts which appear from this report of the proceedings. The plaintiff calls our attention to the fact that under the practice the burden is upon the appellant to preserve the evidence before the court; that in filing its praecipe for the record the appellant specified (13) "stenographic report", (16) "order permitting the use of the original report of proceedings as filed in said cause", and (17) " a certificate that such is a complete transcript of all the proceedings had in said cause". These specifications call for a complete report of the proceedings at the trial. The garnishee-defendant did present a stenographic report of the proceedings had on the motion of the defendant for a new trial, and it is to be noted that the judge interlined

stock [illegible] in [illegible]

paid by the [illegible]

sent, two [illegible]

the business of [illegible]

Chicago, Illinois,

was cut [illegible], tic[illegible]

The plaintiff [illegible]

from the record [illegible]

motion for a new [illegible]

the plaintiff:

"1. That a [illegible]
in said court [illegible]
failed to file [illegible]
court in such [illegible]

2. The report [illegible]
only to the [illegible] ntif)

It is [illegible]

by the court, [illegible]

was entered [illegible]

hearing [illegible]

subsequently, [illegible]

trial court in view [illegible]

report of [illegible]

the first [illegible]

preserve the evidence [illegible]

for the record [illegible]

(18) "[illegible]

on file [illegible]

counsel [illegible]

There [illegible] motion [illegible]

at the trial [illegible]

record of the [illegible]

new trial, [illegible]

corrections certifying the stenographic report as being a record only of the proceedings had upon the motion for a new trial, and this report was filed.

Rule 1 of the Appellate Court, First District, Section (1), subsection (e), amended as of November 26, 1937, provides as follows:

> "(e) Failure by the appellant to file a report of the proceedings or an agreed statement of facts within the time originally allowed or extended, where the praecipe filed by such appellant has specified any of the proceedings at the trial, shall authorize a dismissal of the appellant's appeal, and an order may be made by the trial court, on the application of the appellee, dismissing the same. No dismissal shall be made by the trial court where appellant, after filing his praecipe, elects not to include any proceedings at the trial in the record on review, and transmits the record on appeal to the reviewing court in proper time without such proceedings."

In passing upon the questions involved in this case the rule is that where no report of the proceedings has been filed the court will presume that the evidence heard by the court was sufficient for the purpose of entering judgment, and our attention has been called to several cases where the court has so held. One of the cases cited by the plaintiff is Cogshall v. Beesley, 76 Ill. 445, where it is said:

> "The practice is well settled, that, where the bill of exceptions fails to show that it contains all the evidence in the case, we will not examine whether the evidence it does contain supports the verdict. Minor v. Phillips, 42 Ill. 123.
> It is true, the reporter who reported the evidence on the trial, adds a certificate at the foot of the testimony that the foregoing is all the evidence in the case, but the judge before whom the cause was tried does not state that the bill of exceptions contains all the evidence, or that the certificate of the reporter is even a part of the record.
> The judgment of the circuit court will be affirmed."

In the case of Siegle v. Mitchell, 249 Ill. App. 116, the court cites with approval People v. Nelson, 320 Ill. 273, and quotes therefrom as follows:

> "Where the bill of exceptions does not purport to contain all the evidence the verdict of the jury will not be questioned. (Ballance v. Leonard, 37 Ill. 43; Board of Trustees v. Misenheimer, 89 id. 151); Village of Des Plaines v. Winkelman,

3

correction [illegible]

only of the [illegible]

this report [illegible]

ule I [illegible]

subsection (6), [illegible]

"(6) [illegible]
proceedings [illegible]
originally [illegible]
such [illegible]
trial, shall [illegible]
and an order [illegible]
of the [illegible]
made by the [illegible]
proceedings [illegible]
the record [illegible]
reviewing court [illegible]

In [illegible]

rule is that [illegible]

court will [illegible]

for the purpose [illegible]

called to [illegible]

cases cited by [illegible]

where it is said:

"The [illegible]
exceptions [illegible]
the case, [illegible]
contain [illegible]
It is [illegible]
the trial, [illegible]
the [illegible]
before [illegible]
of [illegible]
of the [illegible]
[illegible]

In [illegible]

court [illegible]

therefore is [illegible]

"[illegible]
contain all [illegible]
[illegible]
v. [illegible] 2 v. [illegible]

> 270 id. 149. The certificate of the court reporter that the bill of exceptions contains all the evidence is not sufficient for that purpose, (Cogshall v. Beesley, 76 Ill. 445; People v. Clark, 298 id. 170); but it is sufficient if the fact affirmatively appears from the record itself that the bill of exceptions contains all the evidence."

The facts affirmatively appear from the record filed, and this is supported by the judge's certificate, which states that it is a transcript only of the proceedings upon the motion for a new trial and, in accordance with the foregoing cases, the judgment of the trial court will not be questioned. The plaintiff made a motion to strike the filed certificate, but in view of the record as it stands the court will not consider the questions raised in the record, for the reason that we must presume there was sufficient evidence - as stated in this opinion - to justify the court in entering the judgment it did enter. Accordingly, the judgment is affirmed.

JUDGMENT AFFIRMED.

HALL, P.J. AND DENIS E. SULLIVAN, J. CONCUR.

40183

MARY GRAZIANI and ENRICO GATTONE,
(Plaintiffs) Appellants,
v.
CITY OF CHICAGO, a Municipal Corporation,
(Defendant) Appellee.

APPEAL FROM
SUPERIOR COURT
COOK COUNTY.

297 I.A. 645

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

The plaintiffs as the appellants appeal from the judgment entered by the trial court to the Supreme Court, and upon a motion the Supreme Court vacated the order and transferred the cause to this court. Plaintiffs' action was to recover the interest alleged to be due upon a condemnation judgment, the principal of which had been paid in full. The trial court entered judgment for the defendant upon the ground that the value of the beneficial use of the property, possession of which was retained by the plaintiffs until payment of the judgment, exceeded the claim for interest. Upon the questions involved in this appeal the trial court held that since payment of the principal of the judgment was accepted by the plaintiffs without protest and without reservation of right to sue, the claim for interest was extinguished. The Supreme Court has passed upon the several questions involved in Turk v. City, 352 Ill. 171; Feldman v. City, 363 Ill. 247; Blaine v. City, 366 Ill. 341, and Kamberos v. City, 366 Ill. 471.

The court considered the testimony of the witnesses and reached the conclusion that the value of the beneficial use of the condemned property, possession of which was retained by the plaintiffs during the period for which interest is claimed, amounts to $1,100.00.

From the facts as they appear in the record, it appears that on July 13, 1928, a final and unconditional judgment was rendered against the City of Chicago in the condemnation proceedings filed in the Superior Court of Cook County entitled City of Chicago v. Landon,

[illegible]

MARY [illegible]

(Intervenor)

v.

CITY [illegible]

(Defendant)

[illegible]

The [illegible]

entered by the trial [illegible]

the Supreme Court v[illegible]

court. Plaintiff [illegible]

due upon a construction [illegible]

paid in full. The [illegible]

upon the ground that [illegible] property,

possession of which [illegible]

the judgment, [illegible] actions

involved in this [illegible] part of the

principal or the [illegible]

protest and with [illegible] the indebt-

ness extinguished.

questions involved [illegible]

See III. 47; [illegible] v. [illegible]

See III. 471.

The [illegible]

redeemed the [illegible]

condemned property [illegible]

during the [illegible]

from the [illegible]

that on July 1, [illegible]

against the City [illegible]

the interior [illegible]

et al., case No. 420818, which was a proceeding to widen Western Avenue in the City of Chicago. The judgment found the just compensation for the 17 feet condemned from the front of plaintiffs' property to be $17,500, and assessed against the remainder of said property, namely, the part not taken, $3,045. On September 16, 1929, the city paid to the plaintiffs $17,500 by means of two checks. The first check was for $14,455 and was paid in cash; the second check was for $3,045 and contained a provision thereon limiting its use "to pay assessment only" and this was endorsed over to the City of Chicago in payment of the special assessment. No interest was paid upon the condemnation judgment. The plaintiffs claim, and the defendant denies that interest was demanded by the plaintiffs and that the principal was accepted under protest.

This case was tried before the court and the court found the issues in favor of the defendant. The court further found that the plaintiffs accepted $17,500 without protest, without making any claim for interest and in full of all claims against the city. The court further found that whatever interest might be allowed would be only on the net award, namely, the award less the assessment against the remainder of the property and that the interest so computed was more than offset by the beneficial use which the plaintiffs had had of the property in the period from the date of the judgment of condemnation up to the date of payment. In Blaine v. City of Chicago, 366 Ill. 341, the court held: that the finality of the judgment - not the date of possession, - has been recognized as the determining factor, and quoted what the court said on this point in Feldman v. City, 363 Ill. 347, as follows:

> "No dispute could arise between the city and the property owner as to the amount to be paid, after the judgment became final and unconditional. The land was then presumed to have been taken for public use. Thenceforth the city could not escape payment of the judgment, regardless of when it took actual possession of the property condemned. (City of Chicago v. McCluer, 339 Ill. 610)."

The court then said:

et al., [illegible]

Avenue in [illegible]

tion for the 17 [illegible]

to be $17,000, [illegible]

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check was for [illegible]

$3,065 [illegible]

assessment only [illegible]

payment of the [illegible]

condemnation [illegible]

that interest [illegible]

was accepted [illegible]

This [illegible]

the issues in [illegible]

the district [illegible]

claim for interest [illegible]

court further [illegible]

only on the net [illegible]

the remainder of [illegible]

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188 Ill. 341, the [illegible]

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factor, [illegible]

City, 206 Ill. [illegible], [illegible] to [illegible]:

"No dispute [illegible]

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public use. [illegible]

judgment, regardless [illegible]

property condemned. [illegible] 188 Ill. 17,

The court then [illegible]:

"With reference to this same argument in the comparatively recent case of Turk v. City of Chicago, 352 Ill. 171, we held: 'The judgment was final and unconditional. It bears no element not found in any quod recuperet judgment entered against a municipality. By that judgment appellant owned the property condemned and all rights pertaining thereto, including the right to take possession. The appellee by that judgment came into an additional right to the compensation awarded. What appellant did, after the date of the judgment, concerning possession of the property was a matter solely within its choosing. There is no authority in law for saying that it could enforce a tenancy on appellee without his agreement thereto, at a rental in the amount of the interest then accruing on the judgment or in any amount.'"

The plaintiffs contend how can a charge against the landowner arise out of his rightful possession? Counsel seem to forget that the landowner remains in possession of the property until payment, not as the tenant of the city, but as a matter of right for the express purpose of protecting his constitutional right of no disturbance of possession until lawful payment therefor, and further contend that upon the entry of a final judgment, the rights of the parties are unalterably fixed by the rendition of that judgment. Can the condemnor, by defying the terms of that judgment, relitigate the rights of the parties? In Turk v. City, 352 Ill. 171, the court held:

"What appellant did, after the date of the judgment, concerning possession of the property was a matter solely within its choosing. There is no authority in law for saying that it could enforce a tenancy on appellee without his agreement thereto, at a rental in the amount of the interest then accuring on the judgment or in any amount."

And, of course, it was the duty of the City of Chicago in this case to make the payment, and any delay or failure to make payment was caused entirely by the city.

In the case of Feldman v. City of Chicago, 363 Ill. 247, the court said:

"When the judgment became final in the present case the owner could not freely use his property. It could not be repaired, altered or rented with any certainty as to time of occupancy or the probable return of any money expended by the owner or lessee upon it. The judgment in favor of the city gave it the right to take possession at any time and thus nullify any effort of the owner or tenant to profit by its beneficial use."

[illegible]

owner arise out [illegible]

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In the case [illegible]

the court said:

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owner could [illegible]
ated, altered [illegible]
or the probable [illegible]
upon it. The [illegible]
take possession [illegible]
owner or tenant [illegible]

The plaintiffs contend in this case that the payment received by them was accepted under protest, with a demand for interest and without any waiver of their claim.

From an examination of the evidence of Mary Graziani, one of the witnesses it does not appear that she waived interest. She stated: "Sure, I will take the check. I will collect the interest after a while." She stated that her husband said she was supposed to get the interest when she got the check. She stated also that she felt she was entitled to interest on the condemnation award, and it appears from her testimony that she expected to receive the interest and intended to enforce it at some time, and from the testimony of Mr. Joseph Graziani it is clear that he wanted interest. In fact he said: "If that is the case, I will take what you were going to give me and will fight for the interest." However, he did not know the name of the man with whom he talked but he described him. It is also clear from the evidence that he insisted upon the payment of interest. Upon this question the court found in the case of Feldman v. City of Chicago, 363 Ill. 347, that there had been a protest, but did not decide that a protest was necessary. In fact the court said in its opinion:

> "To the same effect, it is to be noted that in a recent case (Girard Trust Co. v. United States, 270 U. S. 163, 70 L. ed. 524) the Supreme Court of the United States also held that where a statute expressly provides for the payment of interest on the principal debt, 'the authorities all hold that the acceptance of the payment of the principal debt does not preclude a further suit for the interest unpaid.'"

And it is further said:

> "On the contrary, it is conceded that when the city paid the judgment the owners then demanded interest and accepted under protest the payment of the judgment without interest. Under these circumstances there was no waiver of the interest."

From the facts it is apparent that the plaintiffs did not waive the payment of interest and that they expected the city to pay the interest due on the judgment from its date to the date when it

The [illegible] received by [illegible] interest and [illegible]

From an examination of the [illegible] of the witnesses it [illegible] stated: "Sure, I will [illegible] after a while." [illegible] to get the interest when [illegible] she felt she was [illegible] it appears from her testimony [illegible] interest and intended to [illegible] testimony of Mr. Joseph [illegible] In fact he said: "If [illegible] going to give me and will [illegible] not know the name of the [illegible] him. It is [illegible] payment of interest. [illegible] case of Baldwin v. City [illegible] been a crooked, but [illegible] fact the court said in [illegible]:

> "To the same effect, [illegible] (Girard Trust Co. v. [illegible] 324) the Supreme Court [illegible] where a statute [illegible] on the principal debt, [illegible] acceptance of the [illegible] a further suit for [illegible]

And it is further [illegible]:

> "In the country, [illegible] judgment the same [illegible] protest the payment [illegible] these citizens [illegible]

From the foregoing [illegible] waive the payment of [illegible] the interest [illegible]

was paid. It is indicated by the opinions cited that the city cannot maintain that the value of the beneficial use of the property, possession of which was retained by the plaintiffs until payment of the judgment, exceeded the claim for interest. In other words, the city is not in a position to consider the plaintiffs as tenants and the amount of accrued interest from the date the judgment was entered as payment for the use and occupancy of the premises, and this court is of the opinion that under the facts the court erred in not allowing the interest due. For the reasons stated the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

HALL, P. J. AND DENIS E. SULLIVAN, J. CONCUR.

was paid. It is [illegible]
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the city is not in a position [illegible]
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in not allowing the interest [illegible]
judgment is reversed and the [illegible]

[illegible]

HALL, P. J. [illegible]

40225

LENA WINGERHUTH,

(Plaintiff) Appellee,

v.

WILLIAM MAHER, et al.,

(Defendants) Appellants.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

6 2A

297 I.A. 645[4]

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendants from a decree of foreclosure in favor of the plaintiff entered in said cause. The plaintiff filed her complaint on July 25, 1936, against William Maher and Leonard W. Engels, Executor of the Estate of Charles Erlmann, deceased, George W. Torpe, Trustee, et al., to foreclose a trust deed and notes for $2,300. dated May 29, 1928, and interest coupon note for $69.00 dated May 29, 1931, both due May 29, 1934.

The plaintiff set forth in her bill of complaint that she was the owner of the notes secured by the trust deed, and that the defendants, William Maher and Johanna Maher, his wife, being indebted in the sum of $2,300, executed and delivered their promissory note for said sum with interest coupon notes and trust deed securing the same; that said trust deed was filed on May 31, 1928, in the office of the Recorder of Deeds of Cook County; that the defendant, William Maher, had defaulted in payment of the same at maturity as extended by an extension agreement dated May 29, 1931, and by failure to pay general taxes for the years 1931 to 1934, both inclusive; that by virtue of a decree entered in the Circuit Court in case number 34 C 7355 entitled William Maher, et al. vs. George W. Torpe, et al., on June 22, 1936, said Lena Wingerhuth had a first and paramount lien on said premises, and that the claim of Leonard W. Engels, Executor and of all parties in interest is inferior to the lien of the plaintiff, and praying that a decree of foreclosure be entered with the usual provisions as to redemption, distribution and deficiency decree.

On August 24, 1936, William Maher filed an answer and on November 8, 1937, pursuant to leave of court a reply was filed to said answer. On November 15, 1937, pursuant to leave of court, an amended answer was filed by William Maher, admitting the execution of the trust deed and note for $2,300, but claimed failure of consideration as to $1,800 of said amount and payment of $500; that there is an outstanding trust deed and note for $1,800 in the hands of Leonard W. Engels, Executor; that George W. Torpe, agent of Lena Fingerhuth had failed and neglected to cancel the said note and trust deed for $1,800; that the fair cash market value of said real estate is approximately $2,500; denies that the lien of said Engels is inferior to the alleged lien of plaintiff. On November 17, 1937, plaintiff filed a reply to said answer of William Maher in which plaintiff denies that William Maher paid $500 or any part thereof to the plaintiff, alleges that the matter of the plaintiff and William Maher having been represented by the same counsel had been adjudicated by the Appellate Court of Illinois, First District, in case No. 39157, and that the lien of the plaintiff had also been adjudicated by both the Circuit Court of Cook County, case No. 34 C 7355 and the Appellate Court in case No. 39157, and that the decree of the Circuit Court was affirmed, and attached as exhibits to said reply the decree of the Circuit Court and the mandate of the Appellate Court; that a petition for leave to appeal was filed in the Supreme Court of Illinois and said petition was denied on October 15, 1937, in case No. 24393; that this cause was referred to Ninian Welch, Master in Chancery, who after various hearings rendered his report finding the facts as alleged in the complaint and reply filed by the plaintiff; that objections to the Master's Report were overruled by the Master and exceptions were overruled by the court, and the decree appealed from was entered on December 29, 1937, which is in the usual form of a decree of foreclosure.

On [illegible]

on November 2, 1927, [illegible] to said owner. On October [illegible], 1927, [illegible] to a [illegible] an amended answer [illegible] tion of the trust [illegible] consideration [illegible] there is no [illegible] of Leonard A. Engels, [illegible], event of less Fingerhuth had [illegible] negotiated [illegible] trust deed for $1,000; [illegible] estate is approximately [illegible] is inferior to the [illegible] plaintiff filed a reply to [illegible] in which plaintiff denies that William Ruder [illegible] to the plaintiff, alleges that [illegible] William Ruder [illegible] adjudicated by the [illegible] case No. 28127, and that the [illegible] adjudicated by both the [illegible] 34 C 7388 and the [illegible] decree of the Circuit Court [illegible] to said reply the [illegible] the Appellate Court; [illegible] in the Supreme Court of [illegible] October 15, 1927, in [illegible] to Minion Kelon, master in [illegible] rendered his report [illegible] and reply filed by the [illegible] report were overruled by the [illegible] by the court, and the [illegible] 29, 1927, which is in the [illegible] decree of foreclosure.

The defendants urge that the allegation of want of consideration is a good defense and that the defendant should have been permitted to prove such want of consideration; that the equities of William Maher and the plaintiff were not adjudicated in the former case; that the same attorneys represented both Maher and the plaintiff who have adverse interests in said case; that if the plaintiff, who took from Torpe the trust deed securing the sum of $2,300, as a first mortgage, surrendered the prior trust deed and note for $1,800, and did not mark the note paid or cancelled and did not obtain a release thereof from Torpe, her equities were inferior to the equities of Maher.

In the case of Maher v. Engels, Executor, and Lena Fingerhuth, Case No. 39157, Engels as Executor of the Estate of Erlmann appeals from the decree of the court and insists that the decree should be reversed. It is important to consider what this court said in its opinion, namely:

> "The purchaser of a trust deed or mortgage takes it free of the equities of third parties of which he had no notice, either actual or constructive, and that because Lena Fingerhuth had clothed Torpe with the indicia of the old trust deed and of the notes secured thereby, she is estopped to deny such ownership, or that the trust deed and note were what they purported to be, that is to say, a valid first lien on the land for the sum of $1,800 due and payable on the old note.
>
> The Mahers, as cross-appellants, assert that in view of the fact that the record indicates that the same firm of attorneys in the hearing before the court and Master, represented the Mahers and Lena Fingerhuth, and drafted the decree from which the appeal is taken that the decree should be reversed.
>
> We are of the opinion that the holding that Lena Fingerhuth has a valid prior lien upon the premises to secure the payment of her principal note, is correct, and that in holding that Engels, as executor, has a second, or subsequent lien, the court was also correct. The record shows, beyond any question, that Torpe was acting as agent for the Mahers in the transaction, and that Lena Fingerhuth cannot be held responsible for Erlmann's neglect in failing to ascertain all the facts in the case when he purchased the note and trust deed from Torpe."

From what this court said in that case, the question of want of consideration is not a good defense and the decree is res judicata on the question.

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Defendant Maher contends the defendants had the right to prove that the question of the same attorneys representing the Mahers and Lena Fingerhuth in the prior case was not raised by the pleadings therein, and that the validity of the decree by reason thereof was not decided by the Appellate Court. However, as a matter of fact, the opinion is clear upon that point for the court had in mind - "The Mahers, as cross-appellants, assert that in view of the fact that the record indicates that the same firm of attorneys in the hearing before the court and Master, represented the Mahers and Lena Fingerhuth, and drafted the decree from which the appeal is taken that the decree should be reversed."

Defendant Maher further contends that the refusal of the master to extend the time for defendant to put in his proof and the refusal of the court to direct the master to extend the time for the defendant to put in his complete defense, was an abuse of discretion, and states that he left Chicago on November 20th, and notified his attorney that he would be away from Chicago for about ten days. Upon his return and finding the notice from his attorney, he at once tried to reach him by telephone, without success, and on December 3rd, shortly before the time set for the hearing, employed another attorney, who appeared before the master and asked for a continuance of a few days, in order that the new attorney could acquaint himself with the further testimony to be given, but the master denied this application and closed proofs. Thereafter, this attorney applied to the court for an extension of time to put in the further testimony of defendant Maher and asked for an order that the master be directed to give the defendant an opportunity to put in such testimony. The application was denied by the court.

The question is whether the court abused its discretion in the instant case. It is apparent from the record that this litigation has been passed upon in a prior suit and a decree entered

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in that case which was approved by the Appellate Court as well as by the Supreme Court when leave to appeal was denied.

The argument made is based largely upon questions that were disposed of by this court in a former decision.

As far as we have been able to determine from the facts as they appear here, we are of the opinion that there was no abuse of discretion and the court was justified in refusing to direct the master to consider a further hearing.

For the reasons stated, there being no further errors urged, we believe the trial court was justified in entering the decree of foreclosure.

DECREE AFFIRMED.

HALL, P.J. AND DENIS E. SULLIVAN, J. CONCUR.

40028

ACTINO LABORATORIES, INC.,
Appellee,
v.
SHIPPERS DISPATCH, INC.,
Appellant.

APPEAL FROM
APPELLATE COURT
OF ILLINOIS.

297 I.A. 646

MR. JUSTICE DENIS E. SULLIVAN DELIVERED THE OPINION OF THE COURT.

On June 28, 1937, a judgment was entered for the sum of $351.00 in favor of plaintiff Actino Laboratories, Inc. and against the defendant Shippers Dispatch, Inc., for damages alleged to have been suffered by plaintiff by reason of a belated shipment of goods from Chicago, Illinois to Lorain, Ohio. It is from that judgment that defendant brings this appeal.

The agreed facts are substantially as follows:

There was a contract for such delivery from Chicago, Illinois to Lorain, Ohio, and the goods were accepted by defendant at plaintiff's place of business in Chicago on October 18, 1935, and were to have been carried by motor truck to their destination; that plaintiff's secretary prepared a certain document in the nature of a receipt which does not set forth the time of delivery, which she presented to the driver of the truck and which he signed on behalf of defendant; that on October 18, 1935, defendant prepared a certain document which is also offered in evidence, and appears to be in the nature of a bill of lading which had been forwarded by mail by defendant to plaintiff who received it three days later; that plaintiff paid to defendant $3.12 as prepaid charges for such transportation; that complaint of non-delivery at Lorain, Ohio, was made by plaintiff xxx on October 21, 1935, and defendant instituted an investigation to determine the cause of non-delivery; that on October 22, 1935 defendant discovered that the goods were misdirected due to an old unobliterated marking, and had been placed in inbound

their destination;

freight for delivery to the merchandise mart in Chicago. Thereupon the defendant immediately forwarded the box to Lorain, Ohio, and tender of goods was made to consignee at Lorain, Ohio on October 24, 1935, and was refused.

It is claimed by plaintiff that before turning over said goods to defendant for delivery, it telephoned the office of said defendant and the person answering the telephone guaranteed to make delivery to the consignee at Lorain, Ohio on or before October 2 , 1935. No identification was made as to who the person was who answered the telephone nor that such person had authority to make such pledge. Defendant denied knowledge of this.

When the goods were delivered to the defendant company, the plaintiff prepared a written receipt and had it signed by defendant and it significantly appears that no mention was made in said receipt as to the time of delivery, nor does any time limit appear in the bill of lading.

From a review of this record we do not believe the plaintiff has made out its case by a preponderance of the evidence, and for the reasons herein stated the judgment of the Municipal Court is reversed.

JUDGMENT REVERSED.

HALL, P.J. AND HEBEL, J. CONCUR.

freight for hauling by [illegible]
the defendant [illegible]
tender of payment [illegible]
1932, and are [illegible].

It is [illegible]
goods to defendant [illegible]
defendant [illegible]
delivery to the consignee [illegible]
1932. No [illegible]
answered the bale [illegible]
such plea. [illegible]

[illegible]
the plaintiff [illegible]
defendant and it [illegible]
said receipt is to the [illegible]
appear in the bill of lading.

[illegible]
has made out its [illegible]
the reasons herein [illegible]
reversed.

Hall, J.

40148

ROSA SCHLOGL,

Appellee,

v.

SAPHRONIA R. NEWTON, et al.,

Defendants.

On Appeal of CHARLES MILLER,

Appellant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

297 I.A. 046

MR. JUSTICE DENIS E. SULLIVAN DELIVERED THE OPINION OF THE COURT.

Rosa Schlogl, plaintiff, filed her bill to foreclose a trust deed on certain real estate and the defendant Charles Miller, variously referred to as intervener and intervening petitioner, answered and filed his counter-complaint, claiming a lien for $1,077.50 by reason of work done and material furnished to the premises in question pursuant to an oral agreement made September 10, 1933, at an agreed price of $1,125.00. He also claims that additional work and materials amounted to $92.50; that said work was completed February 20, 1935; that $140.00 was paid and a balance of $1,077.50 still remains due.

It appears that on May 14, 1935, defendant filed his counter-complaint for a mechanic's lien in the office of the clerk of the Circuit Court. Plaintiff's reply alleges she has no information or knowledge sufficient to form a belief as to the material allegations in the counter-complaint, and calls for strict proof thereof.

The evidence shows that defendant received $200.00 over and above credits listed in the counter-claim, thus reducing the amount claimed to $877.50. Issues were joined on the counter-complaint and reply and, upon a reference, the master was ordered to hear the proofs and report his conclusions of law and fact to the court.

4014S

ROSA DOMBROWA,

Appellee,

v.

SAMUROWIA L. [illegible], et al.,

Defendants.

On Appeal of [illegible]

[illegible]

MR. JUSTICE [illegible]

Rosa [illegible] obtained [illegible] trust deed on certain [illegible] verbally related to [illegible] answered and filed [illegible] $1,077.50 by reason [illegible] premises in question [illegible] 10, 1922, at an agreed rate of [illegible] work and materials [illegible] February 8, 1923; [illegible] 80 still remains due.

It [illegible] counter-claim [illegible] of the Circuit Court [illegible] tion or knowledge [illegible] allegations in the [illegible] thereof.

The [illegible] and above credits [illegible] amount claimed to [illegible] and reply and [illegible] proofs and report [illegible]

The report of the master found that the defendant failed to establish his mechanic's lien and that the equities are with the plaintiff and recommended the disallowance of said claim and the dismissal of said counter-complaint for want of equity. A decree was recommended on the complaint to foreclose. Exceptions to the master's report were overruled and the chancellor entered a decree sustaining the master and held "that the intervening petitioner (defendant) Charles Miller, has failed to establish his claim for mechanic's lien by a preponderance of the evidence".

No point is raised as to the pleadings.

Plaintiff's theory is that no evidence was introduced in opposition to defendant's claim for lien.

Several points are urged by the lien claimant as to why the decree of the court should be set aside, none of which in our opinion is controlling. We have read this record as well as the abstract and we find there is one point that is fatal to defendant's contention. There was no competent proof offered to establish the enhancement in value of the premises as a result of the work which defendant claims to have done.

Section 18 of the Mechanic's Lien Act provides:

> " * * * all previous incumbrances shall be preferred to the extent of the value of the land at the time of making the contract, and the lien creditor shall be preferred to the value of the improvements erected on said premises, and the court shall ascertain by jury or otherwise, as the case may require, what proportion of the proceeds of any sale shall be paid to the several parties in interest."

As was said in Metropolitan Life Insurance Co. v. Ohlhaver, 284 Ill. App. 477:

> "The law cast upon appellant the burden of proving that the mortgaged premises in the instant case were enhanced in value by this improvement. In our opinion appellant has not met this requirement. The evidence fails to disclose that this improvement

The report [illegible]

to establish his possession [illegible]

the plaintiff was [illegible]

dismissed if such [illegible]

was recommended [illegible]

master's report [illegible]

sustaining the [illegible] held

Charles Miller, his [illegible]

lien by [illegible]

No point is [illegible]

finding [illegible]

opposition to [illegible]

several [illegible]

the decree of the court [illegible]

opinion is controlling. [illegible]

abstract and we find there [illegible]

contention. There was no [illegible]

embarrassment in [illegible]

defendant claims [illegible]

[illegible]

" " " all proceeds [illegible]

of the value of [illegible]

the lien creditor shall [illegible]

ments secured [illegible]

jury or otherwise [illegible]

the process of [illegible]

in interest."

As was said in Kirkpatrick [illegible] v. [illegible],

284 Ill. App. 477:

"The law [illegible]

the mortgaged premises [illegible]

by this improvement. [illegible]

repairs. The evidence [illegible]

did enhance the value of this farm covered by appellee's mortgage and upon this question we are in complete accord with the findings of the chancellor, and being of this opinion it is unnecessary for us to determine whether the improvement is a lienable one or not."

In the instant case it is not necessary to discuss the other points presented for our consideration. We think the chancellor was right in approving the master's report.

For the reasons herein given the decree of the Circuit Court is affirmed.

DECREE AFFIRMED.

HALL, P.J. AND HEBEL, J. CONCUR.

did enhance [illegible]
and upon this [illegible]
findings of the [illegible]
unnecessary, for [illegible]
literally one or more.

In the [illegible]

other points [illegible]

chancellor [illegible]

for the [illegible]

Court is [illegible].

HALL, J.J. [illegible]

40193 abstract case

JULES G. EICHENBAUM, as Successor-Trustee, et al.,

Plaintiffs,

v.

STATE AND QUINCY BUILDING CORPORATION, ISA W. KAHN, et al.,

Defendants.

CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, as Trustee under Indenture of Trust of Eliza C. Hamill, dated December 16, 1920, known as Trust No. 4512; THE NORTHERN TRUST COMPANY, as Trustee under Trust Agreement dated June 20, 1928, known as Trust No. 7279; EMILY OSBORN BLISS and MAE O. CAROTHERS,

Intervening Petitioners - Appellees,

v.

JULES G. EICHENBAUM, as Successor-Trustee, and ISA W. KAHN, et al.,

Respondents.

On Appeal of JULES G. EICHENBAUM, as Successor-Trustee,

Appellant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

297 I.A. 646[3]

MR. JUSTICE DENIS E. SULLIVAN DELIVERED THE OPINION OF THE COURT.

This case grows out of the same transaction as is involved in Case No. 40052 of this Court entitled, Jules G. Eichenbaum, as Successor Trustee, et al. v. State and Quincy Building Corporation and Isa W. Kahn, et al. Continental Illinois National Bank and Trust Company of Chicago, as Trustee under Indenture of Trust of Eliza C. Hamill, dated December 16, 1920, known as Trust No. 4512; The Northern Trust Company, as Trustee under Trust Agreement dated June 20, 1928, known as Trust No. 7279; Emily Osborn Bliss and Mae O. Carothers, Appellees, v. Isa W. Kahn, Appellant, in which case an opinion has been filed today by this court. An appeal was taken to the Supreme Court by Jules G. Eichenbaum and the same was transferred by that court to the Appellate Court, and we have been requested to consider both cases.

No. 4013S

JULIA C. [illegible]
et al.,

v.

STATE [illegible]
ISA [illegible]

CONTINENTAL [illegible]
TRUST CO. [illegible]
under Indenture [illegible]
dated December [illegible]
No. 4515; [illegible]
Trustee under [illegible]
1928, known as [illegible]
ALISO and [illegible]

Interv[illegible]

JULIA C. [illegible]
and ISA [illegible]

On Appeal of [illegible]
Successor-[illegible]

[illegible]

In Case No. [illegible]

Successor [illegible]

Ian [illegible]

Company and [illegible]

C. [illegible]

Northern [illegible]

June 20, 1928, [illegible]

Ira C. [illegible]

[illegible] an order [illegible]

was taken to the [illegible]

[illegible] appeals [illegible]

[illegible] requested [illegible]

Inasmuch as the rights and interests of the parties and the facts in both cases are practically identical, the law controlling in case No. 40052 of this court is applicable to the instant case. Therefore, for the reasons set forth in our opinion filed in Case No. 40052, the decretal order of the Circuit Court in this case is affirmed, excepting that part of the decree wherein the court finds and removes the said lease as a cloud upon the title and as to that part of the decree, the same is reversed.

DECREE AFFIRMED IN PART AND REVERSED IN PART.

HALL, P.J., AND HEBEL, J., CONCUR.

[illegible]

the probe in [illegible]

in case No. [illegible]

Therefore, for the [illegible]

No. 4055, the [illegible]

affirmed, except [illegible]

and remove the [illegible]

that part of the [illegible]

[illegible]

HALL, P.J., [illegible]

39963

MARTIN H. FINNERAN,
Appellee,

v.

THE CITY OF CALUMET CITY,
a municipal corporation,
Appellant.

CONSOLIDATED

APPEAL FROM CITY COURT
OF CALUMET CITY.

297 I.A. 646

MR. PRESIDING JUSTICE FRIEND
DELIVERED THE OPINION OF THE COURT.

In this case Martin H. Finneran brought suit against the City of Calumet City to recover for services claimed to have been performed by him as commissioner in connection with a special assessment proceeding for the construction of sewers in Calumet city. This suit was consolidated with causes Nos. 39962 and 39964, and the three cases were tried together before the court without a jury, resulting in judgment in favor of Finneran for $1,500. Defendant appealed from this judgment, as well as judgments rendered in causes Nos. 39962 and 39964, and during the pendency of these appeals this suit was consolidated with causes Nos. 39962 and 39964 by orders entered in each case.

An opinion has this day been filed in Markman v. City of Calumet City, No. 39962, and the reasons given and conclusions reached in that case are controlling in this proceeding. The judgment of the City court of Calumet city in this proceeding is therefore affirmed.

JUDGMENT AFFIRMED.

Sullivan and Burke, JJ., concur.

[illegible]

MARTIN K. BINNEKAM, [illegible] CONCOLIDATED

v.

THE CITY [illegible]
a municipal [illegible]
[illegible]

In the [illegible]
City of [illegible]
performed by [illegible]
assessment [illegible]
city. This [illegible]
[illegible],
without a jury,
$1,000. [illegible]
judgment rendered in
the pendency of [illegible]
[illegible]
[illegible]
of Criminal City. [illegible]
[illegible]
judgment of the [illegible]
in that [illegible]

William and [illegible]

39964

CONSOLIDATED

CONSOER, TOWNSEND & QUINLAN,
a corporation,
Appellee,

v.

THE CITY OF CALUMET CITY,
a municipal corporation,
Appellant.

APPEAL FROM CITY COURT
OF CALUMET CITY.

297 I.A. 647

MR. PRESIDING JUSTICE FRIEND
DELIVERED THE OPINION OF THE COURT.

In this case Consoer, Townsend & Quinlan, a corporation, brought suit against the City of Calumet City to recover for services claimed to have been performed by it as engineers in connection with a special assessment proceeding for the construction of sewers in Calumet city. This suit was consolidated with causes Nos. 39962 and 39963, and the three cases were tried together before the court without a jury, resulting in judgment in favor of Consoer, Townsend & Quinlan for $2,000. Defendant appealed from this judgment, as well as judgments rendered in causes Nos. 39962 and 39963, and during the pendency of those appeals this suit was consolidated with causes Nos. 39962 and 39963, by orders entered in each case.

An opinion has this day been filed in Markman v. City of Calumet City, No. 39962, and the reasons given and the conclusions reached in that case are controlling in this proceeding. The judgment of the City court of Calumet city in this proceeding is therefore affirmed.

JUDGMENT AFFIRMED.

Sullivan and Burke, JJ., concur.

40025

JOHN COPELIARES, for use of LOUIS COPELIARES and ANTON COPELIARES,
Appellant,

v.

CHRIST COPELIARES,
Appellee.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

68A

297 I.A. 647

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

John Copeliares, for the use of Louis and Anton Copeliares, brought garnishment proceedings against Christ Copeliares, pursuant to a prior judgment that had been entered against John Copeliares in favor of Louis and Anton, upon which an execution issued and was returned, "No property found." The case was tried by the court without a jury, judgment entered for the garnishee and the garnishment proceedings were accordingly dismissed. Plaintiffs appeal.

The essential facts disclose that in November, 1926, John Copeliares, judgment debtor, and plaintiffs Louis and Anton Copeliares, purchased a lunch room at 638 North State street, Chicago, for $5,000. Afterward, in August, 1930, John Copeliares purchased the interest of his two partners for $1,425. The consideration for this purchase was evidenced by judgment notes of $75 each. January 16, 1936, while about one-half of the notes remained unpaid, John Copeliares executed a bill of sale, conveying to his brother, Christ, garnishee herein, the lunch room in question, "together with the good will and leasehold of the business" for $1,000. Of this amount the garnishee paid only $800, and still owes his brother $200, according to the undisputed evidence. It is likewise conceded that

JOHN DOPELIANS, [illegible]
LOUIS COPELIANS, [illegible]
COPELIANS,

Appellants,

v.

[illegible]

CHRIST [illegible],

Appellee.

[illegible]

MR. [illegible]
[illegible]

John Copeliane, for [illegible] and Louis [illegible] Copeliane, brought garnishment proceedings [illegible] John Copeliane, pursuant to a prior judgment that had been entered by John Copeliane in favor of Louis and [illegible], upon which an execution [illegible] was returned, "No property found." The case was tried by the court without a jury, judgment entered for the garnishee and the garnishment proceedings were accordingly dismissed. [illegible] appeal.

The essential facts disclose that in October, 1926, John Copeliane, judgment debtor, [illegible] Little Lord [illegible] Liane, purchased a lunch room at 636 North [illegible] Street, [illegible] for $5,000. Afterward, in [illegible], John Copeliane [illegible] the interest of his two partners for $1,000. The consideration for this purchase was evidenced by promissory notes of $[illegible] each, [illegible] 10, 1930, while about one-half of the notes remained unpaid, John Copeliane executed a bill of sale, conveying to his brother, Louis, garnishee herein, the lunch room in question, "together with the good will and leasehold" of the [illegible] "[illegible] with amount the garnishee paid only $[illegible], and still owes [illegible] according to the [illegible] was. [illegible] that

no notice was given to the seller's creditors as required by the Bulk Sales act (Illinois Rev. Stats. 1937, chap. 121-1/2, pars. 78 to 80a, secs. 1 to 4). February 13, 1936, plaintiffs caused a judgment by confession to be entered on the unpaid notes and in July of that year garnishment proceedings were instituted. The following month John Copeliares, the seller, filed a voluntary petition in bankruptcy and secured a temporary restraining order against plaintiffs. April, 1937, the federal court denied the bankrupt's petition for discharge on the ground that he had fraudulently transferred the lunch room in question to Christ Copeliares in violation of the Bulk Sales act. The restraining order was dissolved at the same time.

Upon hearing garnishee adduced evidence tending to show that the value of the tangible personal property in the restaurant did not exceed $200. Louis Copeliares, one of the beneficial plaintiffs, testified that he could not tell what the fixtures alone were worth because he had not bought any fixtures, but the other plaintiff, Anton, said that all the fixtures, tables, ranges, ice boxes, counters and other personal property, were worth about $700 or $800, and that he would be willing to pay that much for the property.

At the conclusion of the hearing the court found that no notice as required by the Bulk Sales act was sent, and that "the sale was a fraudulent sale;" that since neither of the creditors had any knowledge of the value of the furniture and fixtures, their testimony would have to be entirely disregarded, and in the absence of any testimony as to value on behalf of the creditors, the court concluded that, "the whole outfit was not worth much more than $210, and since that is exempt property, I am not going to interfere with it. The finding will be that the garnishee will be discharged."

no notice was given [illegible] by the Bank Solicitor [illegible] 78 to 80, [illegible] 1 to 4). [illegible] a judgment by [illegible] July of that year [illegible] following month John [illegible] petition in bankruptcy [illegible] against plaintiffs. [illegible] bankrupt's petition [illegible] fraudulently transferred the lumber [illegible] conspiracy in violation of the [illegible] order was dissolved at the same time.

Upon hearing evidence [illegible] that the value of the two [illegible] did not exceed $900. [illegible] plaintiffs, testified [illegible] alone were worth between [illegible] other plaintiff, [illegible] ice boxes, counters and other [illegible] $700 or $800, and that he would be willing [illegible] the property.

[illegible] the conclusion of the [illegible] notice as required by the Bank [illegible] sale was a fraudulent sale;" [illegible] had any knowledge of the value [illegible] testimony would have to be [illegible] of any testimony [illegible] concluded that, "the [illegible] and since that is exempt [illegible] with it. The finding [illegible] charged."

Although evidence introduced by the garnishee tended to show the value of the property at $200 or less, we think the court was not justified in entirely disregarding the testimony of Anton Copeliares, who said that the tangible furniture, fixtures, tables, ranges, ice box and counters in the restaurant were worth between $700 and $800. His testimony was just as reliable as that of the witnesses introduced on behalf of the garnishee, and there is no reason why the court should have disregarded it. Moreover, no claim was made that the fixtures were exempt property, and there is nothing in the pleadings to indicate that the garnishee was claiming an exemption, and since the court found that no notice was served and that the sale was fraudulent, which was also the conclusion reached in the federal court on application for a discharge in bankruptcy, we are at a loss to understand why the provisions of the Bulk Sales law should not control. Christ Copeliares still owes his brother a considerable sum upon the unpaid balance due for purchase of the restaurant in 1936, and plaintiffs who had a valid judgment against John Copeliares upon which an execution had issued and been returned, "No property found," were entitled to judgment against the garnishee. Accordingly the judgment of the circuit court should be reversed and the cause remanded. It is so ordered.

JUDGMENT REVERSED AND CAUSE REMANDED.

Sullivan and Burke, JJ., concur.

Although evidence introduced [illegible] to show the value of the property [illegible] was not justified in [illegible] hopefulness, who said in [illegible] range, ice box and furniture in the [illegible] $700 and $800. His testimony [illegible] witnesses introduced on behalf of the [illegible] reason why the court should have [illegible] claim was made that the fixtures were [illegible] nothing in the pleading to indicate [illegible] ing an exemption, and [illegible] served and that the file was irregular. [illegible] ciation received in the federal court [illegible] charge in bankruptcy. [illegible] sions of the Bank Law should [illegible] still owes his brother a considerable [illegible] due for purchase of the restaurant in [illegible] a valid judgment against John [illegible] had issued and been returned "no property found" [illegible] to judgment against the garnishee. [illegible] circuit court should be reversed and the [illegible] ordered.

[illegible]

Sullivan and Burke, JJ., concur.

40151

SOPHIE MAJKA,
Plaintiff,

v.

METROPOLITAN LIFE INSURANCE COMPANY, a corporation,
Defendant below.

M. GEORGE LIVINGSTON and LEO T. KAUFMAN, doing business as Livingston & Kaufman, petitioners,
Appellants,

v.

METROPOLITAN LIFE INSURANCE COMPANY, a corporation, respondent,
Appellee.

69A

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

297 I.A. 647[3]

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Sophie Majka brought suit against Metropolitan Life Insurance Company to recover on a $2,500 policy written upon the life of her husband, Stanislaus Majka, who escaped from the Kankakee State Hospital May 10, 1926, and was never heard from thereafter. She recovered judgment in the municipal court for the face value of the policy and certain premiums paid by her up to September, 1934, aggregating $3,074.74. During the pendency of the proceeding in the municipal court M. George Livingston and Leo T. Kaufman, doing business as Livingston & Kaufman, filed a petition to adjudicate and fix their attorneys' lien, which the court allowed in the sum of $100. Another lien for attorney's fees was filed in the same proceeding by Leo M. Tarpey, which after hearing was disallowed by the court. Both lien claimants appealed from the

orders entered on their respective petitions, and during the pendency of these appeals, causes Nos. 40151 and 40164, respectively, were here consolidated by order entered June 28, 1938.

After Mrs. Majka had paid premiums on her policy until 1934 she first consulted Leo M. Tarpey, claimant in cause No. 40164, and discussed with him the possibility of collecting the amount of the policy, which was then delivered to him. She denies that any oral agreement was made relative to collection on the policy, but Tarpey contends that an oral contract was made by which he was to be paid a contingent fee of 20% of whatever might be recovered, by suit or settlement. Immediately after the first conference with Mrs. Majka, Tarpey wrote a letter to the Metropolitan Life Insurance Company, saying that he had been retained to present a claim against the company under the policy, and advised the company that the assured had disappeared May 10, 1926, and had not been heard from since, at the same time demanding payment. He enclosed a notice of attorney's lien. Three days later Tarpey received an answer to his letter, in which the company said that they were investigating the whereabouts of assured. Subsequently Tarpey again wrote to the insurance company, requesting information as to the investigation, and asking that the company inform him as to its conclusion on the question of liability, and the company answered his second letter saying it had not yet completed its investigation and requested further indulgence. Tarpey testified that while this correspondence was in progress Mrs. Majka consulted him three or four times. Before any definite reply had been received from the insurance company as to its position in the matter, Mrs. Majka proceeded to the office of Livingston & Kaufman, petitioners in case No. 40151, and entered into a written contract with them by which she agreed to pay them one-third of the amount recovered from the insurance company pursuant to suit or settlement of the claim. Livingston & Kaufman likewise wrote to

orders entered in their respective [illegible]. In turn, the pendency of these appeals, cause for [illegible] judge, respectively, were here consolidated by order [illegible] June 4, 1932.

After Mrs. Mejia had paid premiums on the policy until 1934 she first consulted Leo L. Tarpey, of [illegible] MOLCA, and discussed with him the possibility of collecting the amount of the policy, which was then delivered to him. [illegible] oral agreement was made not [illegible] on the policy, but Tarpey contends that an oral contract [illegible] by which he was to be paid a contingent fee of 30% of whatever [illegible] recovered, by suit or settlement. Immediately after the first conference with Mrs. Mejia, Tarpey wrote a letter to the [illegible] Insurance Company, saying that he had been retained to prosecute a claim against the company under the policy, and advised the company that the assured had disappeared July 10, 1932, and had not been heard from since, at the same time demanding payment. He enclosed a copy of attorney's lien. Three days later Tarpey received an answer to his letter, in which the company said it only were investigating the whereabouts of assured. Subsequently Tarpey wrote to the insurance company, requesting information as to the investigation, and asking that the company inform him as to its conclusion on the question of liability. The company answered the second letter saying it had not yet completed its investigation and requested further indulgence. Tarpey [illegible] with correspondence was in progress Mrs. Mejia consulted [illegible] other attorney. Before any definite reply had been received from the insurance company as to its position in the matter, Mrs. Mejia [illegible] the office of Livingston & Lauchman, petitioned in [illegible], and entered into a written contract with them by which she agreed [illegible] one-third of the amount recovered from the insurance company [illegible] or settlement of the claim. Livingston & Lauchman likewise wrote to

the insurance company and diligently proceeded with the matter, but before any results could be obtained Mrs. Majka again changed attorneys and retained Laurence M. Fine and Amil M. Haranta, who eventually instituted suit and secured a judgment for $3,074.74 and were fully paid for their services out of a fund which the insurance company had deposited with the clerk of the municipal court, pursuant to the order of the municipal court.

We have carefully examined the record and the contentions made by the respective parties, and have reached the conclusion that both Leo M. Tarpey and Livingston & Kaufman, respectively, had valid liens for attorneys' fees; the former for one-fifth of the amount recovered and the latter for 33-1/3%. As heretofore said the court entirely disallowed the claim of Leo M. Tarpey and awarded Livingston & Kaufman $100 on a quantum meruit basis. We think the court was not justified in reaching either of those conclusions upon the facts presented.

The law is well settled that petitioners who have a valid contract for attorneys' fees, and seeking the enforcement thereof, are not limited in the amount of their recovery to the reasonable value of their services, but are entitled to the fee expressly agreed upon in their contract of employment and specified in the notice of lien given to the defendant. (Caruso v. Pelling, 271 Ill. App. 318.) Therefore, if these respective claimants had a valid lien, as we hold, they should have been awarded the amounts called for in their respective oral and written agreements. However, during the pendency of these appeals both Tarpey and Livingston & Kaufman have filed in this court an agreement in writing to reduce their respective claims to $250, without costs, and have waived any claim for lien in excess of that amount. Therefore, as to the case of Livingston & Kaufman, No. 40151, we hold that the judgment of

the insurance company, [illegible] in the [illegible],
but before any result could be [illegible] the plaintiff engaged
attorneys and pursued [illegible] suit. [illegible] the
eventually insured [illegible]
and were fully paid for their [illegible] upon the
insurance company [illegible] the of the municipal
court, pursuant to [illegible] [illegible].

We have carefully [illegible] the contentions
made by the respective [illegible] and conclude
that both Leo [illegible] respectively,
had valid liens for [illegible] for one-fifth of
the amount recovered [illegible] -Lyon [illegible]
said the court [illegible] claim of [illegible]
and awarded liens on [illegible] [illegible].
We think the court was not [illegible] in [illegible] or those
conclusions upon the [illegible].

The law in well [illegible] upon [illegible] the law is well
contract for [illegible] and [illegible] of [illegible],
are not limited in the amount of their recovery to the reasonable
value of their services, but may [illegible] the
agreed upon in their contract [illegible] in the
notice of lien given to the defendant. (Cf. [illegible] v. [illegible] 111 [illegible],
111. pp. 618.) Therefore, if [illegible] the
valid lien, as we hold, they should be [illegible] the amounts
called for in their respective [illegible] and [illegible] [illegible].
ever, during the pendency of the [illegible] [illegible]
& Kaufman have filed [illegible]
their respective [illegible]
claim for lien in excess of [illegible]
of Livingston [illegible] No. [illegible] [illegible] of

the municipal court should be reversed, and since these claimants have agreed to accept $250 in lieu of their claims and have waived any claim for lien in excess of that amount, judgment is entered here in their favor in the amount of $250.

JUDGMENT REVERSED AND JUDGMENT ENTERED HERE FOR PETITIONERS M. GEORGE LIVINGSTON AND LEO M. KAUFMAN FOR $250.

Sullivan and Burke, JJ., concur.

the municipal court. [illegible] would be [illegible] have agreed to [illegible] any claim for [illegible] more in which [illegible]

Sullivan and Burke, JJ., concur.

40164

SOPHIE MAJKA,
Appellee,

v.

METROPOLITAN LIFE INSURANCE COMPANY, a corporation,
Defendant below.

IN THE MATTER OF THE PETITION OF LEO M. TARPEY, ATTORNEY FOR ADJUDICATION OF ATTORNEY'S LIEN.

LEO M. TARPEY,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

297 I.A. 648

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Upon appeal this cause was consolidated with cause No. 40151 on June 23, 1938. We have this day filed an opinion in cause No. 40151 setting forth the nature of the claim for lien of Livingston & Kaufman in that proceeding and of Leo M. Tarpey in this case, and reciting the facts underlying their respective claims and the conclusions reached. What we said in that opinion is controlling in this case. We are of opinion that Leo M. Tarpey had a valid contract for attorney's fees with Sophie Majka, plaintiff, in the municipal court case against Metropolitan Life Insurance Company for 20% of the amount recovered, that he duly served notice of his lien on the insurance company and is entitled to maintain it. During pendency of these appeals, however, he filed in this court written consent to reduce his claim to $250, without costs, and waived any claim for lien in excess of that amount. Therefore the judgment of the municipal court is reversed and judgment entered here in favor of Leo M. Tarpey for $250.

JUDGMENT REVERSED AND JUDGMENT HERE FOR PETITIONER LEO M. TARPEY FOR $250.

Sullivan and Burke, JJ., concur.

39870

WALTER J. FLENS and FRANK W. MICHALAK, copartners, trading as FLENS AND MICHALAK,
Appellees,

v.

POLISH NATIONAL ALLIANCE OF THE UNITED STATES OF NORTH AMERICA, a corporation,
Appellant.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

297 I.A. 648

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

After a bench trial in an action for attorneys' fees there was a finding and judgment against defendant in the sum of $3,500.

Plaintiffs introduced evidence that they necessarily expended 492-1/2 hours under an engagement by Polish National Alliance of the United States of North America, a corporation, which obligated plaintiffs to defend an action sounding in damages for malicious prosecution and false imprisonment brought by one Irene Wozniak. Defendant maintains that a major part of the time for which plaintiffs charge was not reasonably necessary to the proper defense of the Wozniak case and that the judgment is excessive, contending that plaintiffs' services were not reasonably worth more than $750.

Defendant is a fraternal beneficiary society, with groups (more commonly called lodges) in various cities, and its national headquarters in Chicago. Irene Wozniak, secretary of Group 887, was arrested on the complaint of Frank Rybicki, Group president, on a charge of embezzlement, and the Municipal court of Chicago dismissed the complaint, whereupon Mrs. Wozniak sued Frank Rybicki and defendant, charging malicious prosecution and false imprison-

ment. Plaintiffs were employed to defend and a $100 retainer fee was paid. No express agreement as to the fee to be charged was entered into and the law therefore implies a contract to pay the usual and customary fee. The Wozniak complaint consisted of six counts, three of which charged false imprisonment and three malicious prosecution. One of the counts (on each charge) was leveled at Rybicki, one against the Alliance, and the third against both defendants. Mr. Flens filed an answer for the defendants and a counterclaim in behalf of Group 887. Mrs. Wozniak moved to strike the counterclaim, whereupon Mr. Flens withdrew the answer and counterclaim and filed a motion to strike the Wozniak complaint. As a consequence the three false imprisonment counts were stricken. Then Mr. Flens filed a new answer on behalf of the Alliance, which was virtually a repetition of the previous answer. After withdrawing the counterclaim of the Group, Mr. Flens filed a counterclaim on behalf of the Alliance. He filed twenty-four interrogatories and the court required Mrs. Wozniak to answer four of them. When she answered Mr. Flens moved that she and her attorneys be held in contempt, and also moved for a summary judgment on the counterclaim in behalf of the Alliance. His motion for judgment on the counterclaim, with a finding of malice, was allowed, and judgment in tort went against Mrs. Wozniak. The contempt proceeding was continued for disposition to the time of the trial on the merits. Before the case came on for trial Mrs. Wozniak agreed to a dismissal of her action and to the payment by her of the amount of the summary judgment.

Plaintiffs argue that because of their labor and skill their client was successful in the case without incurring the risk of a trial. Plaintiffs charge for 53-1/2 hours' time in studying the law; 134 hours in examining pleadings, preparing answers and

ment. Plaintiffs [illegible] employed [illegible] retainer fee was paid. No [illegible] agreement [illegible] be charged was entered into and the law firm [illegible] contract to pay the usual and customary fee. The [illegible] complaint contained of six counts, three of which charged [illegible] and three malicious prosecution. Six of the counts (on each charge) was leveled at Hybiont, one [illegible] the Alliance, and the other against both defendants. Mr. Plane filed an answer for the defendants and a counterclaim in behalf of Hybiont. Mr. [illegible] moved to strike the counterclaim, whereupon Mr. Plane filed the answer and counterclaim and filed a motion to strike the [illegible] complaint. As a consequence the three of the [illegible] were [illegible]. Then Mr. Plane filed a new answer on behalf of the Alliance, which was virtually a repetition of the previous answer, [illegible] drawing the counterclaim [illegible]. Mr. Plane filed a counterclaim on behalf of the Alliance. He filed twenty-four interrogatories and the court required Mr. [illegible] to answer four of them. When he answered Mr. Plane moved [illegible] be held in contempt, and also moved for a [illegible] by judgment on the counterclaim in behalf of the Alliance. His motion for judgment on the counterclaim, with [illegible] of malice, was allowed, and judgment in tort went against [illegible]. The contempt proceeding was continued for disposition to the time of the trial on the merits. Before the [illegible] Mr. [illegible] moved [illegible] a dismissal of her motion and to the payment by her of the amount of the summary judgment.

Plaintiffs argue that because of their [illegible] and skill their client was successful in the case without incurring the risk of a trial. Plaintiffs charge for 8-1/2 hours' time in studying the law; 104 hours in examining pleadings, preparing answers and

counterclaim and affidavits for a summary judgment; 26 hours for appearances on nine uncontested motions; 2 hours for preparation of motions; 18-1/2 hours for preparing interrogatories; 6 hours for preparing summons and giving it to sheriff and examining sheriff's return and preparing appearance, and 3 hours for preparing an order for continuance. The case was one that did not involve any unusual difficulties. It was not necessary to spend so much time in studying the law, and the answers were not difficult to draft. The actions of Attorney Flens in filing interrogatories and instituting contempt and summary judgment proceedings were based on his belief that such steps were appropriate, and the result achieved apparently justified the methods he employed. It would serve no useful purpose to comment on each item for which plaintiffs charge. The time expended was excessive and not reasonably necessary to the defense of the case. We have carefully read the record and are of the opinion that the judgment should not exceed $1,500. Therefore, if within ten days from the filing of this opinion plaintiffs will file in this court a remittitur of $2,000, the judgment against defendant will be affirmed for $1,500; otherwise it will be reversed and the cause remanded to the Circuit court of Cook county for a new trial.

JUDGMENT AFFIRMED FOR $1,500 UPON
REMITTITUR OF $2,000; OTHERWISE
JUDGMENT REVERSED AND CAUSE REMANDED.

Friend, P. J., and Sullivan, J., concur.

39959

72A

WILLIAM PARRILLO,
Appellee,

v.

SAMUEL BERNSTEIN,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

297 I.A. 648

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

William Parrillo, an attorney at law practicing in Chicago, filed his complaint in the Superior court of Cook county and therein charged that while riding in an elevator being operated in a building at 10 North Clark street and in the exercise of due care for his own safety defendant negligently and carelessly operated and managed the elevator so that it dropped and fell from the thirteenth floor to the bottom of the elevator shaft, where it struck with great force and violence and that as a consequence plaintiff was injured, "and has been and will be prevented from attending to his usual and ordinary affairs and duties, and has lostand will lose divers gains and profits he otherwise would have made and acquired." On a trial by a jury a verdict was returned finding defendant guilty and assessing plaintiff's damages at the sum of $4,000. Judgment was entered, and this appeal brings the case before us for review.

The first point urged is that error was committed in excluding proffered testimony of Dr. Peter J. Stanul. To pass on the point it will be necessary to discuss the evidence at some length. Plaintiff testified that he was admitted to the bar in 1923; that for seven and one-half years he was an assistant United States District attorney and since then was engaged in private practice;

WILLIAM TARGILLO,
Appellee,

v.

SAMUEL B. [illegible],
Appellant.

MR. JUSTICE BURN [illegible] DELIVERED THE OPINION.

William Targillo, [illegible] was practicing in Chicago, filed his complaint in the superior court of Cook county and therein charged that while riding in an elevator being operated in a building at 10 North Dearborn street and in the exercise of due care for his own safety defendant negligently and carelessly operated and managed the elevator so that it dropped and fell from the thirteenth floor to the bottom of the elev tor shaft, where it struck with great force and violence and that as a consequence plaintiff was injured, "and has been and will be prevented from attending to his usual and ordinary affairs and duties, and has lost and will lose divers gains and profits he otherwise would have made and acquired." On a trial by a jury a verdict was returned finding defendant guilty and assessing plaintiff's damages at the sum of $[illegible]. Judgment was entered, and this appeal follows the e [illegible] before us for review.

The first point [illegible] or [illegible] as committed in excluding proffered testimony of [illegible] tenant. To pass on the point it will be necessary to [illegible] the evidence in some length. Plaintiff testified that he [illegible] committee to the bar in 1922; that for seven and one-half years [illegible] was an assistant United States District attorney [illegible] was engaged in private practice;

that until November 13, 1933, his health and strength were good; that on the day last mentioned he had offices on the fifteenth floor of the building at 10 North Clark street, owned by defendant; that there are three passenger elevators in the building; that between 5 and 5:30 he was leaving for the day and entered the elevator, on which were six or seven other people; that the elevator stopped at the fifteenth floor, at the fourteenth floor, and at the thirteenth floor, at which time there were approximately seventeen people in the elevator; that the operator attempted to stop at the twelfth floor and the elevator or the brakes dragged for another one or two floors; that the elevator then shot down so fast he could not see the numbers on the floors; that "when we hit the basement there was no spring motion but there was a solid strike and the strike was so hard that the roof of the elevator, which is made of glass, came down upon all the passengers and the light which is in the center of the elevator also came down on the heads of the passengers in the elevator;" that he was standing erect in the elevator and "when we hit the basement I was down to my knees and when I got up I felt a severe pain across the abdomen;" that he held his hand to the abdomen until he got in an automobile which was in front of the building and was driven to 2758 Van Buren street where he was examined by Dr. Emanuel H. Turek, who advised plaintiff to go to bed and put some hot applications on his side, which he did; that he felt nauseated and could not eat that night when he got home; that there was a swelling on the right side and severe pain; that the next morning the pain was worse; that he went to his office the next day about noon to attend to an urgent matter that was pending; that he was driven to the door and with the aid of the driver of the car went to the office where he remained a few minutes and then went back home; that during the trip he had severe pain and

when he arrived home decided to call the family physician, Dr. John B. Cipriani, who continued to apply hot applications and gave him shots to relieve the pain; that "after a couple of days he saw that the hot applications were not doing much good and he told me I had better go to a hospital immediately, that he thought there was an incarcerated testicle. As far as I knew I had had a congenital or from birth had an undescended testicle. I had never had any complaint. As far as I know there was only a single testicle in the sac;" that Dr. Cipriani went with him to the Mother Cabrini hospital on November 20, 1933, and consulted with one or two other doctors in the hospital; that the next morning he was operated on; that the pain got severer with time; that there was a swelling on the right side, alongside the leg, below the stomach, and about where the groin would be; that after the operation he noticed that the incision was about four inches long, just left of his right leg; that he was bandaged tightly and lay in bed for about eleven days; that he was taken home, was told to wear a belt, which he wore "for quite some time;" that the doctor asked him to wear it for about a year; that he wore it about six months, "and when the weather got warm I removed it and just took it easy, rather than go about my business as I formerly did. The operation gave me some relief. Once in a great while I have a little pain there. Otherwise, the pain is not as severe as it was before the operation;" that he played football when he was in high school, and baseball even while practicing law; that he has been forbidden to do that since the operation and is not taking any violent physical exercises. He told about the charges for physicians' services and other expenses incurred. Over objection, he testified as to loss of earnings. He stated that after getting up from his sick bed he was advised by

when he arrived home [illegible] ly sick.
Mr. John [illegible] along and
gave him [illegible] example of dope
he saw that was [illegible]
told me I [illegible] thought
there was [illegible] had been a
congenital or [illegible] had never
had any complaint. [illegible]
testicle in the [illegible] other
Cabrini Hospital [illegible] one or
two other doctors in the [illegible] he was
operated on; [illegible] there was a
swelling on [illegible] scrotum.
and about where the [illegible] the operation he
noticed that the [illegible] left of
his right leg; [illegible] leg in bed for
about eleven days; [illegible] told to wear a belt,
which he wore [illegible] doctor asked him to
wear it for [illegible] six months. "And
when the weather [illegible] rather
then go about my [illegible] The operation gave me
some relief. [illegible] pain there.
Otherwise, the pain [illegible] the operation"
that he plays [illegible] normal, and he could even
while practicing [illegible] that since
the operation [illegible] violent play in I exercises. He
told about the [illegible] other symptoms
insured. Over objection [illegible] to loss of earnings. He
stated that after [illegible] he was relieved by

his doctor to go to a warm climate; that the day after Christmas he took his family and went to Florida, where he remained until January 15; that about that time he received a telephone call about an important client and he came home; that he went to the office for the first time about January 18; that he went home and remained at home except for telephone calls and going to the office about an hour a day; that starting about February 1, 1934, he began putting in more time in the office but did not engage in active trial work for some time.

Dr. Cipriani, a witness called on behalf of plaintiff, testified that he was licensed to practice in 1913; that he served an interneship of one year at the Columbus hospital and since 1919 he has been teaching at the University of Illinois; that he was connected with the Mother Cabrini hospital, West Suburban, St. Anne's and St. Elizabeth's hospitals; that he saw plaintiff the second day after the injury; that he found him in pain, with tenderness and swelling on the right side; that plaintiff had an incarcerated hernia that was giving him quite a bit of pain; that the swelling dated back to the night before; that the patient complained of a nauseated feeling, but no vomitting, no temperature; that witness continued putting on heat, as had been previously suggested by Dr. Turek, "to see if this thing would reduce on heat;" that in the course of a couple of days the swelling became more evident; that "you could feel the external ring with a little more bulging with the change more marked. Mr. Parrillo ran a little temperature and still continued to have his pain and nauseated feeling, so after about five or six days we took him into the hospital to operate on him for this hernia. We couldn't reduce it so that was the only means of reducing it by operative measures. The fact that this swelling persisted and that the swelling became more evident

would indicate more inflammation and more accumulation. The danger of more inflammation and accumulation there is that you might get secondary peritonitis and you could get gangrene. Any time that swelling persists and doesn't get back to normal the swelling becomes larger and more tender and naturally you have to think of some blood interference. In my opinion, I believe it was necessary at that time to perform an operation." The witness related that he took the patient to the hospital and the next morning operated; that he "made a regular incision. I opened up the sac and found free fluid. There was an injection of the contents of that sac, there was an injection of a portion of the omentum in the testicle. The testicle was injected so that the omentum sac itself contained this free fluid. I reduced the hernia and it was impossible to repair the hernia properly without the removal of the testicle. That testicle had been severed from circulation or partial circulation for five or six days preceding the operation and then we did the regular closure work like for any hernia and that is all. Omentum is supposed to be the policeman of the belly. It is a covering of the tissue. They extend from the greater curvature of the stomach that covers the bowels and viscera of the bowel and this omentum is the protector. The omentum came down through the ring and being a fat, soft tissue a little more got in the ring so it couldn't come back and because of this it interfered with the circulation of the hernia. The omentum was markedly congested due to the constriction. You would call it the beginning of strangulation. Strangulation would result in death to that portion of the tissue. My recollection of the testicle was that it was about the size of a hickory nut, I believe, if you will look over the records. That is the statement towards the size, it was about the size of a hickory nut. I would say about an inch,

would indicate more [illegible] than [illegible] obstruction. The danger of more infection and [illegible] for [illegible] that you might get secondary peritonitis and you [illegible] emergence. Any time that swelling [illegible] to normal the swelling becomes larger and more [illegible] you have to think of some blood [illegible]. In my opinion, I believe it was necessary at that time to perform an operation." The witness related that he took the patient to the [illegible] morning open test; that he "[illegible] opened up the sac and found free fluid. There was an inflammation of the contents of that sac, there was an injection of [illegible] omentum in the testicle. The testicle was injected so that the omentum and itself could [illegible] fluid. [illegible] reduced the hernia and it was impossible [illegible] the hernia [illegible] without the removal of the testicle. The testicle had been severed from circulation or partial circulation to live or die [illegible] according the operation and then [illegible] clamps [illegible] like for any hernia and that is all. Omentum is supposed to be the [illegible] of the belly. It is a covering of the intestines. They extend from the greater curvature of [illegible] covering the bowels and viscera of the bowel and this omentum [illegible] protector. The omentum came down [illegible] and been [illegible] a little more [illegible] and [illegible] of this it interfered with [illegible] of the hernia. The omentum was markedly congested due to the congestion. You could call it the beginning of a strangulation. Strangulation would result in death to that portion of the [illegible]. My recollection of the testicle was that it was about the size of [illegible], I believe, if you will look over the record. [illegible] towards the [illegible], it was about the size of a [illegible] nut. I would say about an inch,

probably, in length, so far as the diameter, I would say possibly about half an inch. An undescended testicle is a testicle that does not come down to its normal position normally in the scrotum. An undescended testicle is the result of congenital malformation. An undescended testicle may and does have the cord attached to it the same as one that is completely descended. Ordinarily you find an undescended testicle in the inguinal canal in the groin. When I opened up the belly of this plaintiff I noticed that the only evidence of violence was the swelling, the free fluid and the injection. Evidence of violence shows an acute trauma or acute bruising. Complete trauma means bruising. The testicle instead of being in its normal position was in the groin. The hernia occupied the groin, that is, the sac. The testicle was inside of the sac. It was impossible to replace that testicle and put it in its normal position and still get a cure from the rupture. The testicle was injected due to the constriction previously from this omentum I spoke of with this free fluid that was in the sac showing there was an acute inflammatory condition. In this particular case, I don't think it would be safe or good practice to allow the testicle in that condition to remain incapsulated in the inguinal canal. A rupture is the same as hernia. It is a protrusion through the external or internal ring - more commonly through the internal ring of the peritoneum, the lining of the inside with either the omentum of the bowels or fat tissue contained in this bulging. In this case it was the testicle. The omentum gets in through this telescoping of this peritoneum. This peritoneum is covered with a segment having two openings, but the normal position of the peritoneum is supposed to be inside and from an effort or straining it is possible for the peritoneum to protrude through; in other words, telescope through this opening and, naturally, in telescoping through it becomes an

prob bly, in non th, [illegible] the [illegible] I [illegible] my [illegible]
about half an inch. [illegible] I [illegible] which the
door not come do n [illegible] on the [illegible] on.
An undecoended [illegible] the [illegible] I [illegible] ion.
An undecoended tom [illegible] v [illegible]
the same [illegible] I [illegible] d
an undecoended [illegible] . Then
I opened up [illegible] the bath [illegible] ho coal,
evidence of violence [illegible] no the in-
jection. Evidence of [illegible] ut [illegible]
bruising. Tonsils [illegible] . [illegible] metal
of being in its normal [illegible] . [illegible]
occupied the [illegible] . [illegible]
the sac. It was [illegible] in
its normal position [illegible] . The
testicle was in [illegible] rotation [illegible]
cemetum l epiko of [illegible] In [illegible]
there may [illegible] , [illegible]
I don't think [illegible] .
in that [illegible] .
rupture in the [illegible] .
external or [illegible] through the
of the peritoneum, [illegible] it the [illegible] on
of the bowel [illegible] but [illegible] in the one
it was the [illegible] of [illegible]
of this peritoneum. [illegible] having
two opening, but [illegible] of [illegible] to suppose
to be inside [illegible] the [illegible]
peritoneum [illegible] through
this opening [illegible] . [illegible] on it becomes an

abnormal cavity so whatever is behind can come down with this abnormal sac. The omentum is a covering inside of the peritoneum sac. It is attached to the stomach and covers the small bowel. The peritoneum on the other hand is like an envelope for the whole external and internal ring that is, all of the belly. The omentum is the portion inside of the peritoneum. After removing the testicle and closing up the hernia I then took all of the omentum out of the canal. I then closed up these rings absolutely and tied them as long as we didn't have any cord or testises. Where you had a spermatic cord you couldn't close them too tight as it shuts off the circulation and nourishment of the cord. From my examination of the testicle I would say that it was slightly atrophied - smaller than normal. The effect of strangulation or compression of the omentum and other parts of the intestines and undescended testicle would eventually destroy them and cause gangrene. It would have a tendency to shrink them if the circulation was totally impaired. There was an impingement or interference with the circulation of this testicle. It would be impossible for me to state, after cutting open this man, as to whether or not the testicle was or was not functioning prior to the time of the operation. A testicle, though undescended, will function and such functioning is an important part of the human body. A testicle, in addition to secreting and excreting semen, also produces the hormones that help to maintain equilibrium. These hormones are one of the necessary chemical productions of the body. In normal adults each testicle secretes its own material and taking away one takes away that much of the body. The hormones have something to do with the molding of the character of the human person. They have some function as to the propagation of the species. Trauma or injury is important in the production of a so-called hernia. If a person jumped from a distance and landed on his feet, that type of

abnormal cavity so that even in bulkin [illegible] of this abnormal sac. The omentum is a [illegible] peritoneum sac. It is attached [illegible] covering the small bowel. The peritoneum in the [illegible] like an envelope for the whole external and internal [illegible] of the belly. The omentum is the portion inside of the peritoneum. After turning the testicle and closing [illegible] with a tuck full of the omentum out of the canal. I then closed up [illegible] and tied them as long as [illegible] have any cord or testicles. Here you had a spermatic cord you could close them [illegible] in it minute off the circulation [illegible] movement of the cord. From my examination of the testicle I [illegible] slightly enlarged - smaller than normal. The [illegible] of strangulation or compression of the omentum and other parts of the intestines and unscrewing a testicle would eventually [illegible] and [illegible]. It would have a tendency to shrink [illegible] the circulation [illegible] totally impaired. There was an implirement or interference with the circulation of this testicle. [illegible] would be impossible for me to state, after cutting open this man, [illegible] to which or not the testicle was or was not functioning prior to the time of the operation. The testicle, though undescended, will function [illegible] an important part of the human body. The testicle, in addition to secreting and excreting semen, also produces the hormone that help to maintain equilibrium. These hormones are one of the necessary chemical productions of the body. In normal adult, each testicle secreates its own material and taking away one [illegible] in a man of the body. The hormones have something to do with the [illegible] character of the human person. They have some function [illegible] the species. Trauma or injury is [illegible] in the production of a [illegible] hernia. If a person jumped from [illegible] and landed on his feet, that type of

telescopic injury could have a bearing on the production of a hernia. The upper, or internal ring, is the one that is closest to the intestines. Whatever compresses the intestine downward would have an effect upon this ring." (Italics ours.)

A hypothetical question was propounded to the witness and he answered that "I have an opinion based upon reasonable medical certainty as to whether or not there was sufficient reason in the accident to cause or bring about the hernia and that my opinion is that there is no doubt about the accident, that that could bring on this hernia. My opinion, based upon reasonable medical certainty, is that an impingement of the omentum going through the inguinal canal into the sac could produce this hernia. It is my opinion, based upon reasonable medical certainty, that the condition of the undescended testicle could result from the accident." The witness saw the patient every day until he was discharged from the hospital and saw him every day at home for a week or ten days, at the end of which time the patient was in a rather debilitated state, quite weakened, and witness suggested that the patient, for convalescence, go away for a while, which he did.

On cross-examination the witness stated that the undescended testicle on the right side is what is known as "congenital," meaning one which occurs by reason of birth; that "the fact that the testicle did not come down into the bag had nothing to do with the accident at all;" that at the hospital he made a diagnosis of "an undescended testicle and congenital hernia. By congenital hernia I refer to a condition in the inguinal canal that was formed at the time of birth at the time the testicle on the right side failed to go down into the bag or scrotum. In other words, there was a hernial condition existing at the time of Mr. Parrillo's birth in the inguinal canal."

[illegible] on of a
hernia. The upper, or [illegible] closest
to the intestines. [illegible] and
would have an effect upon this injury. [illegible])

[illegible]
and he [illegible] on [illegible] reasonable
medical certainty as to [illegible] or not there was anything in the accident [illegible] my
opinion [illegible] which that
could bring on this hernia. [illegible] upon reasonable
medical certainty, [illegible] the occurrence coming
through the inguinal canal [illegible] hernia.
It is my opinion, based [illegible] medical certainty, that
the condition of the [illegible] resulted from the
accident." The [illegible] may well be
discharged from the hospital [illegible] or by day [illegible] home for
week or ten days, [illegible] the end of that time the patient was in a
rather debilitated [illegible] condition, [illegible] emphasized
that the patient, [illegible] for [illegible] which
he did.

On cross-examination [illegible] that the [illegible] and
testicle on the [illegible] "[illegible] L." meaning
one which occurs by [illegible] "the [illegible] testicle
did not come down in [illegible] probably to [illegible] the condition
at all." that [illegible] chronic of "an undescended
testicle and congenital [illegible]. [illegible] hernia I refer to a
condition in which [illegible] formed [illegible] line of birth
at the time the testicle [illegible] made its way down into
the bag or scrotum. In other words, there was a hernial condition
existing at the time of [illegible] in the inguinal canal."

Witness continued: "When I removed the testicle I could not say that it was atrophied, acute or chronic, because the testicle was injected and was smaller than normal. I said in my operative report that I found a small atrophied testicle in the sac about the size of a hickory nut. I am almost certain that I wrote 'atrophied testicle.' On looking at the operative report again it refreshes my recollection and I remember I said 'small atrophied testicle found in sac.' That is what I found. By atrophied I mean smaller than normal. Not necessarily a withering. When I removed this atrophied testicle I followed the regular course that is done in hospitals and sent it down immediately to the Pathological Laboratory in order that I might have a pathological examination made of the testicle itself. That was the rule. On examination of the records of the Pathological Laboratory it refreshes my memory that it went down to the Pathological Laboratory. The Pathologist's report says 'the size of a hickory nut, soft like, shiny, red in color and brown in color, a testicle with various states of atrophy and increased amount of fibrous tissue.' The Pathologist made an examination of this testicle under the microscope. He also made a laboratory diagnosis. I don't recall what that diagnosis was. I would define an atrophied testicle as one being smaller than normal. The word 'atrophied' could be wasting. Amongst lay people the common definition is wasting. I would not say that atrophy or wasting is something that takes place over a considerable period of time. It is impossible to say just how long. It could be months. In the case of Mr. Parrillo I would not be able to answer so far as to the time that had elapsed for the atrophy to take place. I don't think I could give the time that would elapse for the atrophy of a testicle because after all I would think it would really be a question to ask someone who had more experience on that question. This kind of atrophy does not

[illegible]

that [illegible]

[illegible]

report that [illegible]

the place of [illegible]

'atrophied [illegible]

it reforms my [illegible]

technic [illegible]

smaller than [illegible]

this atrophy [illegible]

in hospitals [illegible]

laboratory in [illegible]

of the complete [illegible]

records of the radio [illegible]

it went down [illegible]

report [illegible]

color and [illegible]

and increased [illegible]

examination of [illegible]

laboratory diagnosis. [illegible]

would define [illegible]

the word 'atrophied' [illegible]

definition [illegible]

something that [illegible]

impossible to [illegible]

Mr. Parrillo [illegible]

had elapsed [illegible]

the time that [illegible]

all I would [illegible]

had more experience [illegible]

happen immediately. The wasting is a process that keeps on going on and the testicle gets smaller and smaller. I don't believe I would be in a position to say whether you could determine absolutely if this testicle that I examined and removed from Mr. Parrillo had any functional value by the examination under a microscope. Such examination would not necessarily be the best way. A microscope would show to a certain extent the possible functioning. I would not be able to answer whether it would be the only way you could definitely tell whether the cells or the testicle were alive or not. I didn't look at the portion of the testicle through the microscope. When I gave my opinion that this testicle had functional value it was not based upon any microscopic examination. I don't recall having made a statement that in my opinion the cells in this atrophied testicle had functional value. I answered a question saying that it is possible for an undescended testicle to function. * * * I don't know whether this handling had any actual effect upon the testicle. I didn't examine the cell life of it. Immediately after the testicle was removed it was taken to the Pathological Laboratory but I don't know whether it was examined there. It is the rule that it should be taken there and examined. The minute I remove this specimen from the individual I hand it to the nurse and she takes it down to the Pathological Laboratory right after we complete the operation, which may take a half hour or three-quarters of an hour." (Italics ours.) On redirect examination witness testified, "When the testicle is dissected from the body the circulation is cut off. The circulation into the cells is cut off." On re-cross examination he testified: "I don't think I testified on my direct examination that the circulation had just commenced to be cut off at the time I operated. The circulation was not completely cut off at the time I examined the testicle."

happen immediately. The [illegible] on and the testicle get [illegible]. [illegible] would be in [illegible] if this testicle that [illegible] any functional value [illegible] examination would not [illegible] would show to [illegible] not be able to [illegible] definitely tell which [illegible] I didn't look [illegible] then I gave my [illegible] was not based [illegible] having [illegible] atrophied [illegible] saying the [illegible] * * * I can't imagine [illegible] the testicle. I [illegible] after the testicle [illegible] laboratory but I [illegible] the rule that it should [illegible] I remove this [illegible] and she takes [illegible] complete the [illegible] of an hour." (Testifying [illegible] testified, "When [illegible] is out off. [illegible] is out off." On re-[illegible] examination [illegible] examination that [illegible] at the time I operated. [illegible] at the time I examined the testicle.

Dr. R. W. McNealy testified on behalf of plaintiff that he examined plaintiff after the operation; that he is familiar with the process and function of the human testicle; that the testicle "represents the primary secretory sac and has two functions, one is the secretion of the sperm which propagates life and the second has to do with changes in the body which are called secondary sex characteristics which are many and have to do with the appearance of the male in contrast to the female and probably have some effect on his desires and on his mental functions. A normal man has two testicles and it is reasonable to conclude that these are part of a normal man's make-up for the normal physical activity of a man. If I assume that one of the testicles is taken away he would probably have one-half as much secretory activity and discharge of sperm cells as he would have if he had two testicles. As to whether or not it would affect his ability to propagate, this would be a matter of arithmetic. Probably he would have more chance if he had more sperm cells. He would have less chance if he had less sperm. The removal of one testicle would lessen by one-half the internal secretions which have to do with secondary sex characteristics. That would affect his masculine appearance, his voice, his general distribution of fat and hair and would probably have some effect on his psychic or mental attitude. If any secondary sex characteristics were established the less likelihood there would be that any great change would result upon the removal of one testicle. The younger the individual, the more likelihood there would be of this change. An undescended testicle may or may not function with the same excretion and secretion that a descended testicle has. * * * [cross-examination] When I refer to a testicle that was removed and also the results that such removal would have upon the sex life of the individual, I refer, of course, to the fact that a normal testicle

[illegible] . Let us [illegible] of Jaminski. Just be examined fundamentally [illegible] he is a [illegible] with the process and function of [illegible] testicle; then the testicle "represents the [illegible] consciousness [illegible] the time line, one is the secretion of the sperm which [illegible] life and the second has to do with [illegible] the body [illegible] sex characteristics [illegible] of the male in [illegible] and which have [illegible] on his development or his mental functions. [illegible] testicle and it is [illegible] a normal male-up [illegible] the normal physic [illegible] of a man. If I assume that one of the [illegible] may be [illegible] probably have one-half as much [illegible] of sperm cells as he would have if he [illegible] . [illegible] whether or not it would affect his [illegible] of arithmetic. [illegible] of [illegible] more sperm cells. [illegible] removal of one [illegible] secretions [illegible] . That would affect his memorizing [illegible] , his general distribution of [illegible] his psychic [illegible] were sets [illegible] change would [illegible] the individual. [illegible] An undescended [illegible] exercise [illegible] examination] [illegible] the results [illegible] I will have upon the [illegible] of the individual, I believe, of course, to be not that normal testicle

had been removed rather than an abnormal or useless testicle. I presume that if you take a useless testicle away you just remove a useless testicle. As a matter of medical practice I would say that if you took away a good testicle you would only have one left, medically or arithmetically. The remaining testicle does not compensate for the removal of one testicle. It will merely do its own work." (Italics ours.)

Former Judge Emanuel Eller testified corroborating the statement of plaintiff as to the occurrence.

Dr. Turek related that he was consulted and that he examined plaintiff on the day of the occurrence; that plaintiff "seemed to be in a moderate degree of shock and extreme nervousness, pale of face, cold and clammy and complained of severe pain in the groin, the right groin and some abdominal distress and a severe backache." Witness said that plaintiff told him about the elevator falling and witness advised him to go home, lie down, and apply some hot packs to the right groin if the pain increased; that witness saw plaintiff the next day and he did not feel any better; that about the second day after the accident Dr. Cipriani was called in; that "this pain and swelling in the right groin increased to a considerable size so much that he had to stay absolutely in bed for a period of a few days;" that witness was present at the operation; that at home plaintiff was slow in recovery and was advised to seek a warmer climate; that plaintiff went to Florida; that witness treated him after he returned; that "about four or five months after the operation he seemed to be developing a cough and at first his cough was discounted and it became active and so became paroxysmal and a definite case of asthma was established in Mr. Parrillo. At times this asthma would become so terrible and we would him to bed and he was very sick, and this condition has re-occurred from time to time and we have put him to bed for many a day and at no time in

had been [illegible]

I pre[illegible]

remove a medical [illegible]

would say that [illegible]

have one left, [illegible]

terrible dora[illegible]

It will [illegible]

Former Judge [illegible] the

statement of John [illegible]

Dr. Turek [illegible]

examined plaintiff [illegible]

"seemed to be in a [illegible] and [illegible]

pain of face, could [illegible] in the

groin, the right [illegible] severe

headache." [illegible] the elevator

falling and [illegible] and apply

some hot pad [illegible]

near [illegible]

that about [illegible]

called in; that "[illegible]

to a considerable [illegible]

for a period of [illegible]

tion; that at [illegible]

seek a former [illegible]

urged him [illegible]

the operation [illegible]

enough was [illegible]

and a definite [illegible]

time that [illegible]

and he was [illegible]

to time [illegible]

the many years that I have known him and have associated with him has he ever complained of any of these ailments which have occurred since this operation. The significance in so far as the chemistry of the body is concerned of taking away one of the testicles is that a man's ability to procreate is diminished by one-half; consequently his sex characteristics are affected; his libido is affected. There seems to be a general disturbance in a cycle of the consequence of internal secretion of the body of which we know a lot and yet we just know smatterings. Asthma is a spasmodic condition of the lungs, characterized by difficulty in breathing, the etiology of which are many; supposedly most of them are on an allergic basis and cannot be explained. The glands of internal secretion of the body are many; the thyroid, the adrenals, the para thyroid, testicles and ovaries. Pituitary, pineal bodies and many others that we know very little about. These glands throw off a secretion known as hormones into the body and they control the various functions of the body and it seems to be just one round cycle, and any disturbance in that cycle throws this cycle off balance and it may be manifested by disturbance of breathing, disturbance of the thyroid, as toxic thyroids; it may even affect one's hearing, one's nervous make up and the general mental condition of the patient. In other words it controls everything about us; we know much about it, yet we do know that what we know is very little. Asthma is more apt to occur in younger individuals who are of a nervous make up, where there is an instability of one's self, one who is easily excited and in one in whom no definite cause can be found. Mr. Parrillo was tested repeatedly for this cause of asthma and on one occasion I had to accompany him to the Mayo Clinic, he was so very sick that he couldn't travel alone. He was tested for sensibility to certain dust pollens, dusts, dandruffs,

the many years that I have known [illegible] man has he ever complained of any of these ailments which have occurred since this operation. The significance in [illegible] the normality of the body is somewhat [illegible] one [illegible] includes in that a man's ability to procreate is [illegible] by [illegible] frequently his own characteristics [illegible] this thing is affected. There seems to be a general [illegible] in a cycle of the consequence of internal secretion of the body of which we know a lot and yet we just know [illegible]. Asthma is a spasmodic condition of the lungs, characterized by difficulty in breathing, the etiology of which one [illegible] [illegible] of them are on an allergic basis and [illegible]. The glands of internal secretion of the body are many: the thyroid, the adrenals, the para thyroid, testicles and ovaries. Actually, pineal bodies are many others that we know very little about. These glands throw off a secretion known as hormones into the body and they control the various functions of the body and it seems to be just one round cycle, and any disturbance in that cycle throws this cycle off balance and it may be manifested by all manner of breathing, disturbance of the thyroid, as [illegible] thyroids; it may even affect one's breathing, one's nervous make up and the general mental condition of the patient. In other words it controls everything about us; we know much about it, yet we do know that we know so very little. Asthma is more apt to occur in younger individuals. The men of a nervous make up, where there is an instability of one's self, one who is easily excited [illegible] in one in whom no definite cause can be found. Mr. [illegible] [illegible] for this cause of asthma and on [illegible] accompany him to the Lego Clinic, he was so [illegible] [illegible] travel alone. He was tested for sensibility to [illegible] dust, pollens, dust, d [illegible],

hairs and what not. The absence of a testicle and the consequent inability to excrete the hormones spoken of, have an effect upon the human body."

A hypothetical question was prepounded which, in addition to other things, required him to assume that within four or five months after the accident occurred the patient began to develop a cough which ultimately developed into paroxysms of coughing and was finally diagnosed as acute asthma, and there was considerable nervousness, and that "his physical capacity to procreate had been diminished," and witness answered, "I have an opinion, based upon reasonable medical certainty, as to whether or not there was sufficient in the accident and subsequent injury described to cause or bring about this condition of asthma mentioned in the hypothetical person. It is my opinion that this accident and the subsequent operation that followed had a definite bearing to the production of asthma in this individual. The longer one has asthma, the longer he is going to have it. Some have been cured but very few. The tendency always remains." On cross-examination the witness stated that the patient had a hernia and that it was his (witness's) impression and opinion that it was of recent origin. He further stated that he watched the operation performed by Dr. Cipriani and examined the testicle that was removed; that "it was partially atrophic. It was the size of a hickory nut. What was there appeared normal, but was shrunken from normal size. By atrophied I mean it was just diminished in size. It was smaller. An atrophy of a testicle means a complete disappearance of a testicle beyond the physiological function. Atrophy might mean a wasting or shrinking of the particular organ. As a matter of fact it does. This testicle was smaller. I cannot tell whether it was atrophied or not because I did not see it when it was supposed to have been of the normal size. To me it was normal, by the appearance it had;

heirs and what not. The presence of [illegible] and the con-
sequent inability to [illegible] the [illegible] clean cut, have no
effect upon the human body."

A hypothetical question was propounded which, in addition
to other things, required him to assume that [illegible] three or five
months after the accident [illegible] the patient began to develop a
cough which finally [illegible] two paroxysms of coughing and
was finally diagnosed as [illegible], and there was con siderable
nervousness, and that "his [illegible] generally to pieces had been
diminished," and witness [illegible] "I have an opinion, based upon
reasonable medical certainty, [illegible] whether or not there was suffi-
cient in the accident and [illegible] injury described to cause or
bring about this condition of [illegible] mentioned in the hypothetical
person. It is my opinion that [illegible] and the subsequent
operation that follows has a definite or vital to the production of
asthma in this individual. The longer one has asthma, the longer
he is going to have it. Cures have been cured but very few. The
tendency always remains." On cross-examination the witness stated
that the patient had a family and [illegible] (witness's)
impression and opinion [illegible] of his own origin. He further
stated that he noticed the operation performed by Dr. Oliphant and
examined the testicle [illegible] atrophied, [illegible] partially
atrophic. It was the size of a [illegible] nut. But was there
appeared normal, but [illegible] normal size. By atrophied
I mean it was just [illegible] size. It was smaller. Atrophy
of a testicle means a [illegible] diminishing of a testicle beyond
the physiological function. Atrophy might mean a wasting or
shrinking of the particular organ. As a matter of fact it does.
This testicle was smaller. I cannot tell whether it was atrophied
or not because I did not see it when it was supposed to have been of
the normal size. To me it was normal, by the appearance it had;

it was small. Well, you can't determine whether it is atrophied or not. It may be normal for the individual that has it; a man may be formed with one arm shorter than the other, and yet one can't say that it is atrophied because it is shrunken in size. By an examination of this testicle, I was unable to determine whether it was atrophied or not. I think after the testicle was removed it was sent down to the pathological laboratory. I think it was examined in the pathological laboratory. I saw the report of that examination. * * * I may have considered, in giving my answer to the hypothetical question, that the incarcerated or undescended testicle on the right side was in the same normality as the left testicle. I did not examine any portion of this testicle under a microscope, and I have no way of telling as to whether or not the cells in that testicle were alive or dead at the time the testicle was removed. From gross observation I would say there was considerable life to it. If a piece of tissue is severed from a body and handled by one or two or three or four nurses in the operating room, immediately upon severance from the body, the tissue becomes dead. There is no way of keeping tissue alive over a period of time, and when tissue is examined after dissection, in certain solutions, and then cut up and stands, and kept and cut up in fine tissue paper size for microscopical examination, the tissues are dead upon examination microscopically. You could just determine whether or not cells were there, and if they were there, they were precluded to be alive. Upon examination of tissue under a microscope, all tissues are dead. You could tell by a microscopic examination whether those cells were alive at the time the operation took place, if the examination under the microscope was made within an hour or two after the operation took place. It would be my opinion that if it was found by reason of a microscopic examination that the

it was small. Well, you can't determine whether it is atrophied or not. It may be normal for the individual. A man, or a man may be formed with one arm shorter than the other, and yet one can't say that it is atrophied because it is shrunken in size. By an examination of this testicle, I was unable to determine whether it was atrophied or not. I right after the testicle was removed it was sent down to the pathological laboratory. I think it was examined in the pathological laboratory. I saw the report of that examination. [illegible] may have [illegible], in giving my answer to the hypothetical question, of the indurated or undescended testicle on the right side and in the same normally as the left testicle. I did not examine any portion of this testicle under a microscope, and I have no way of telling [illegible] whether or not the cells in that testicle were alive or dead. At the time the testicle was removed, from gross observation I could [illegible] there was considerable life to it. If a piece of tissue is removed from a body and handled by one or two or three or four nurses in the operating room, immediately upon severance from the body, the tissue becomes dead. There is no way of keeping tissue alive over a period of time, and when tissue is examined after dissection, in certain solutions, and then put up in alcohol, and kept and put up in fine tissue paper sent for microscopical examination, the tissues are dead upon examination microscopically. I can not tell [illegible] whether or not cells were there, or if they were there. They were presumed to be alive. Upon examination of tissue under a microscope, all tissues are dead. One could tell by a microscopic examination whether those cells were alive at the time the operation took place, if the examination under the microscope was made within an hour or two after the operation took place. It would be my opinion that if it was found by means of a microscopic examination that the

cells were dead at the time the operation took place, that such finding would not be up to par and I would question the diagnosis." (Italics ours.)

For defendant, Joseph Lewis testified, in substance, that he was the elevator operator; that on November 13, 1933, at about 5:30 in the afternoon he picked up ten passengers on the fifteenth floor and seven in the thirteenth floor; that he did not stop between the thirteenth and the tenth floors; that he had room for more passengers; that he tried to stop at the eighth floor and the car did not stop; that at the time it approached the eighth floor it was going about one-fourth of normal speed; that he applied his brakes but the elevator continued to slide down; that he threw his control in reverse; that when the brakes were applied the power was cut off; that "it slowed the car down. From the eighth floor down I would say that we went about eight to ten miles per hour. I was going about one-fourth speed. The car kept sliding down until it hit the bottom. It hit the springs and bounced up." He described how the passengers got out of the car.

Plaintiff put on the stand Dr. Peter J. Stanul, who testified that he has been a physician and surgeon in Illinois since 1930; that he is a graduate of the Loyola University School of Medicine; that he specialized in pathology and is connected with the Columbus hospital on the North side and Mother Cabrini hospital on the West side, as a pathologist; that he carries on his own private practice besides; that "a pathologist is a man in the hospital who analyzes the tissues that are removed from any patient that comes in the hospital and gives a diagnosis of that tissue. I was active in that capacity in November of 1933, in connection with the Mother Cabrini Hospital and Columbus Hospital in Chicago. As a part of my business I have occasion to examine many microscopic slides. I would say, conservatively, that I have examined fifty

cells were dead at the time the [illegible] of, that such finding would not be up to par [illegible] the diagnosis." (Italics ours.)

For defendant, Joseph [illegible], testified, in substance, that he was the elevator operator; that on January 1, 1930, at about 5:30 in the afternoon he picked up [illegible] on the fifteenth floor and seven in the thirteenth floor; that he did not stop between the thirteenth and the ninth floors; that he had room for more passengers; that he tried to stop at the eighth floor and the car did not stop; that at the time it approached the eighth floor it was going about one-fourth of normal speed; that he applied his brakes but the elevator continued to slide down; that he threw his control in reverse; that when the brakes were applied the power was cut off; that "it slowed the car down." From the eighth floor down I would say that we were about eight to ten miles per hour. I was going about one-fourth speed. The car kept sliding down until it hit the bottom. It hit the springs and bounced up." He described how the passengers got out of the car.

Plaintiff put on the stand Dr. Robert [illegible], who testified that he has been a physician and surgeon in Illinois since 1930; that he is a graduate of the Loyola University School of Medicine; that he specialized in pathology and is connected with the Columbus Hospital on the South Side and worked during his spital on the West Side, as a physical lab; that he [illegible] in his own private practice being; that "a pathologist is [illegible] in the hospital who analyzes the tissues that are removed from the patients that come in the hospital on [illegible] of [illegible] disease. I was active in that capacity in November of 1930, in connection with the Mother Cabrini Hospital and Columbus [illegible] played in [illegible]. a part of my business I have occasion to examine many microscopic slides. I would say, conservatively, that have examined fifty

thousand slides during my experience. I have occasion to make post mortems from time to time. I have made approximately over one thousand. In connection with the operation performed on William Parrillo on November 21, 1933, at the Mother Cabrini Hospital, I examined a piece of tissue that was sent along as removed from William Parrillo." At this juncture plaintiff's attorney asked that the answer be stricken, and out of the presence of the jury defendant offered to prove by the witness that he was a pathologist at the Mother Cabrini hospital; that on the morning of the operation the witness received in the pathological laboratory "a speciman consisting of an undescended testicle and a piece of a sac resulting from a herniotomy, which bore a ticket or card attached to it stating the name of William Parrillo; and that this specimen consisting of the testicle and the sac that was sent down, had been sent down from the operating room. * * * And that it was the regular practice and procedure and routine in the Mother Cabrini Hospital at that time that after each and every operation was made that the specimen or organs which had been removed would be sent down to the pathological laboratory for an examination by the pathologist. And, that at that time the pathologist made an examination of this undescended testicle which had been sent down to him from the operating room, and he found objectively and grossly an undescended testicle the size of a hickory nut, or about the size of a small marble; and that this testicle was very soft, deep yellow and brown in color and atrophic; and at that time he cut off a piece of the tissue and examined it and upon his examination he found it to be fibrous in resistance; and that the portion of the testicle was then put in a fixing fluid, which is a preservative, for the purpose of preserving the specimen indefinitely; and that within a period of twenty-four hours after it had been placed in this fixing fluid this witness made a microscopic examination of the testicle, or of

thousand autopsies during my experience. I have occasion to make post mortems from time to time. I have made probably certainly over one thousand. In connection with the operation performed on William Ferrillo on November 21, 1938, at the Kitner Memorial Hospital, I examined a piece of [illegible] removed from William Ferrillo, [illegible] plaintiff's attorney asked that the answer be stricken, on [illegible] of the presence of the jury defendant offered to prove by the witness that he [illegible] pathologist at the Kitner Memorial Hospital; that on the morning of the operation the witness received in the pathological laboratory "a specimen consisting of an unidentified tissue and piece of a sac resulting from a hernotomy, which bore a tickler or card attached to it stating the name of William Ferrillo; that this specimen consisting of the testicle and the [illegible] had been sent down from the operating room, [illegible] and that it was the regular practice and procedure [illegible] Memorial Hospital at that time that after each and every operation was made that the specimen or organs which had been removed could be sent down to the pathological laboratory for examination by the pathologist, and that at that time the pathologist made an examination of this condemned testicle which had been sent down from the operating room, and he found objectively and [illegible] condemned testicle the size of a hickory nut, or about [illegible] small marble; and that this testicle was very soft, [illegible] and brown in color and atrophic; and at that time he cut off a piece of the tissue and examined it and upon his examination he found it to be fibrous in resistance; and that the portion of the testicle he then put in a fixing fluid, which is a preservative, for the purpose of preserving the specimen indefinitely; and that within a period of twenty-four hours after it had been placed in the fixing fluid this witness made a microscopic examination of the testicle, or of

the specimen, and under this microscopic examination he observed that this tissue had no cell life and was atrophic in character and contained fibrous tissue; and that upon his original examination before the microscopic examination this doctor further observed that the testicle in question was not injected, that is, it did not contain any blood cells during the time he examined it. * * * I further offer to prove by this witness that, based upon examination which he made at that time, this witness will testify that he has an opinion that the testicle in question which he examined both grossly and under the microscope previously referred to did not have any functional value at any time, either at any time before the accident or after the accident. And I wish to offer that proof by this witness as to his opinion. * * * I further wish to prove by this witness that at the time he made his microscopic examination of this testicle that there were no sex cells in existence in the specimen which he examined; * * * that at the time he made the examination of this testicle there was no evidence, either under gross examination of the testicle or under the microscopic examination of the testicle of any strangulation of the testicle or of the peritoneum; * * * that at the time that he made his examination of this testicle, both the gross examination and the microscopic examination, he saw no evidence of any trauma or violence." The court refused to allow Dr. Stanul to testify in accordance with the offer of proof. Before the jury the witness then testified as an expert. He answered a hypothetical question the effect of which was to counteract the testimony of the physicians who testified for plaintiff. Dr. Fred W. Miller also testified as an expert for defendant.

Mr. Charles Schaub, on behalf of plaintiff, testified that he is an attorney; that he was on the elevator at the time it fell, and that within five minutes after the accident the operator said,

the specimen, one under this microscope [illegible] observed
that this tissue [illegible] in [illegible]
and continued thereon [illegible] examination
before the microscopic examiner [illegible] observed that
the testicle in question was not injected, [illegible] did not con-
tain any blood cells [illegible] it. * * * I further
offer to prove by the [illegible] that, [illegible] examination [illegible] he
made at that time, that [illegible] he was of opinion
that the testicle in question [illegible] to be healthy and
under the microscope [illegible] in [illegible] opinion
tional value [illegible] either [illegible] the [illegible]
or after the accident. [illegible]
as to his opinion, * * * [illegible] he [illegible]
that at the time he [illegible] of the
testicle that there [illegible] in the specimen
which he examined [illegible] the [illegible]
of this testicle there [illegible] with [illegible] examination
of the testicle or [illegible] of the testicle
of any atrophy of the [illegible] * * * that
at the time the [illegible] the
gross examination and [illegible] no evi-
dence of any trauma or violence [illegible]
tional to testify in [illegible]
the jury the [illegible]
hypothetical question [illegible] to answer if he
testimony of the jury [illegible] for plaintiff [illegible]
. Miller also to [illegible] for defendant.

Mr. [illegible], on behalf of plaintiff, testified that
he is an attorney; [illegible] in the city [illegible]
and that within five minutes [illegible] the opinion of

"The damn thing slipped yesterday."

The theory on which the court excluded the evidence of Dr. Stanul was that the identity of the testicle examined by him in the pathological laboratory had not been sufficiently established. The record shows that plaintiff's witnesses testified that the undescended testicle was smaller than normal, atrophied, and about the size of a hickory nut; that Dr. Ciprianifollowed the regular course and sent it down immediately to the pathological laboratory for the purpose of having a pathological examination made; that on an examination of the record of the pathological laboratory his memory was refreshed that it went down to the pathological laboratory, and that the pathologist's report shows that the testicle examined was "the size of a hickory nut, soft like, shiny, red in color and brown in color, a testicle with various stages of atrophy and increased amount of fibrous tissue." He further testified that immediately after the testicle was removed it was taken to the pathological laboratory. Dr. Turek testified that after the testicle was removed it was sent to the pathological laboratory, that he thought it was examined in the pathological laboratory and he saw the report of the examination. The proffered testimony of Dr. Stanul would establish that on the morning of the operation he received in the pathological laboratory a specimen consisting of an undescended testicle and a piece of sac resulting from a herniotomy, which bore a ticket or cord attached to it bearing the name of William Parrillo, and that the specimen, consisting of the testicle and sac, had been sent down from the operating room and the tag stated it had been sent down by Dr. Cipriani, and that it was the regular practice and procedure in the hospital at that time that after each operation the specimen would be sent down to the laboratory for an examination by the pathologist. It is worthy of note that the testicle which was

"The damn thing slipped [illegible]."

The theory on which the [illegible] of Dr. Stanul was that the [illegible] by him in the pathological laboratory [illegible] established. The re-[illegible] that the [illegible] and about the size of a [illegible] the regular course and [illegible] laboratory for the purpose of having [illegible] made; that on an examination of the [illegible] laboratory like memory [illegible] logical laboratory, and [illegible] testicle examined was "the size of a [illegible] red in color and brown in color, [illegible] atrophy and increased [illegible]." He further testified that immediately after the [illegible] pathological laboratory. [illegible] was removed it was [illegible] thought it was [illegible] the report of the examination. The proof red testimony of Dr. Stanul would establish that in the [illegible] the pathological laboratory [illegible] testicle and a piece of [illegible] a ticket or [illegible] and that the specimen, [illegible] of the testicle [illegible] had been sent down from the [illegible] down by Dr. Gipriani, [illegible] coduce in the hospital [illegible] specimen would be sent [illegible] the pathologist. [illegible]

received by Dr. Stanul very closely answers the description of the testicle that was removed from plaintiff. Plaintiff maintained that the operation was necessitated by the accident, that plaintiff sustained the loss of a testicle having functional value and that the removal of the testicle had a direct effect upon his internal secretions, hormones, sex characteristics and libido, and that the removal of the testicle proximately caused the asthma which developed four or five months after the accident. On the other hand, defendant contended that the undescended testicle never had any functional value or cell life and that its removal would not result in any loss to plaintiff. We are convinced that the excluded testimony of Dr. Stanul was of considerable importance, from the standpoint of defendant's theory, in determining the amount of damages to be awarded. Whether a specimen examined in a pathological laboratory is the same as that which was removed from a litigant's body is determined by the facts of each case, and no useful purpose will be served by a discussion of the facts in the various cases cited by the respective counsel. The evidence sufficiently identified the testicle and sac examined by the pathologist as the same which had been removed from the body of plaintiff. The physicians who testified in behalf of plaintiff virtually conceded that such was the fact and alluded to the report of the pathologist. Defendant had a clear right to have the jury listen to the testimony of Dr. Stanul. The error is of such gravity as to necessitate the cause being remanded for a new trial.

Defendant complains of the court's refusal to give defendant's instruction number sixteen, which reads:

"The court instructs you that there is no evidence and the plaintiff does not claim there is any evidence in this case that the elevator of the defendant was not properly equipped, or that said elevator was lacking in any appliances, or that it was defective in any way, or that the operator of said elevator was incompetent and the plaintiff cannot recover in this case upon any such ground or grounds."

received my ex- [illegible]

[illegible]

that the [illegible]

sustained the loss of a [illegible]

the removal of the [illegible]

accretions, however, [illegible]

removal of the tonsils [illegible]

four or five months after the [illegible]

contended that the [illegible]

or ill life and [illegible]

plaintiff. [illegible]

was of considerable [illegible]

theory, in determining [illegible]

a specimen examined in [illegible]

which was removed from [illegible]

of such cases, [illegible]

of the facts in the [illegible]

The evidence [illegible]

by the pathologist [illegible]

of plaintiff. The jury [illegible]

virtually concluded [illegible]

of the pathologist. [illegible]

listen to the testimony [illegible]

as to necessitate [illegible]

before [illegible]

subtle instruction [illegible]

"The court [illegible]

the plaintiff [illegible]

that the view [illegible]

that said of [illegible]

defective in [illegible]

incompetent [illegible]

any such [illegible]

The court did not err in refusing to give the instruction, as it would tend to confuse the jury. If there was any evidence which the jury should not have heard the court could, on objection, have kept the same from the jury. It is customary to give an instruction phrased in general terms to the effect that the jury should disregard all testimony and statements that were stricken from the record.

Defendant asserts that it was error to admit testimony by plaintiff as to the contents of his income tax return, and contends that if such testimony is admissible at all the return itself would be the best evidence. Plaintiff contends that the admission of the testimony was harmless in view of the fact that the witness had already testified as to his income. While it was improper to testify as to the contents of a written document that was not in evidence without laying a basis for the introduction of secondary evidence, we agree with plaintiff that the giving of the testimony was harmless.

Another contention is that the court erred in permitting plaintiff to introduce evidence of his income when the complaint does not set up special damages and because such proof as a basis of damages is speculative. It is well established that damages are either general or special. General damages are such as the law implies or presumes to have accrued from the wrong complained of. Special damages are such as really took place and are not implied by the law. As a general rule, when the law does not necessarily imply that the plaintiff sustained damage by the act complained of, it is essential that the resulting damage should be shown with particularity. The reason why plaintiff is required to state the particular damage sustained is to prevent surprise of defendant. Loss of earnings is a proper element of damage. Plaintiff in his brief states that "there was no endeavor on the part of the plaintiff to prove special damages. The only damage that

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it was sought to prove was the loss of earnings. * * * Nothing was said about loss of profits, and no evidence introduced with reference to loss of profits. There is a vast difference between loss of profits and loss of earnings." The complaint recites that "the plaintiff was thereby greatly injured, and the plaintiff's body was greatly crushed, bruised, lacerated and injured, both internally and externally, and he became thereupon sick, sore, lame and disordered, and will be sick, sore, lame and disordered the remainder of his life, during all of which time the plaintiff has suffered and will suffer great pain, and has been and will be prevented from attending to his usual and ordinary affairs and duties, and has lost and will lose divers gains and profits he otherwise would have made and acquired, and has paid, laid out and expended, and will be compelled to lay out, pay and expend large sums of money in and about endeavoring to be healed and cured of his said hurts, bruises, wounds, lacerations and injuries received as aforesaid." At the time defendant filed his answer he knew that plaintiff was a lawyer. Defendant could reasonably expect under the language last quoted that plaintiff would endeavor to prove loss of earnings while he was incapacitated, and there was no error in admitting that testimony. Defendant also objects that plaintiff did not testify about his office expenses. We find that the record shows that there was testimony as to his expenses.

For the reasons stated we are of the opinion that the judgment of the Superior court of Cook county should be and it is reversed and the cause remanded for a new trial.

JUDGMENT REVERSED AND CAUSE
REMANDED FOR A NEW TRIAL.

Friend, P. J., and Sullivan, J., concur.

it was sought to prove [illegible] earnings. Nothing was said about loss of profits, [illegible] reference to loss of profits. [illegible] loss of profits and loss of [illegible] "the plaintiff was [illegible] injured, [illegible] body was generally [illegible], [illegible], [illegible], [illegible] internally and externally, [illegible] and disordered, and [illegible] manhood of his life, [illegible] suffered and will suffer [illegible] vented from attending to his business [illegible] and has lost and will lose [illegible] would have made [illegible] and will be compelled to [illegible] money in and about endeavoring [illegible] bruises, wounds, lacerations and injuries [illegible] lost."

At the time defendant filed his [illegible] that plaintiff was a lawyer. Defendant could [illegible] under the [illegible] quoted that plaintiff would endeavor to prove loss of earnings while he was incapacitated, and there was no error in [illegible] that testimony. Defendant also objected that plaintiff did not testify about his office expenses. We find that the record shows that there was testimony as to his expenses.

For the reasons stated we are of the opinion that the judgment of the Superior court of Cook county should be and it is reversed and the cause remanded for a new trial.

TUCKER, MT. ROYAL and VAN DUZER
R.M.K., NOT. K. MT. I.

Friend, J., J., and Millard, J., concur.

40184

GEORGE POLOS,
Appellee,

v.

GUST BOUSSIS, ANDREW KOLEGUS, and MORRISON SERVICE CO., a (cp), JOHN DOE and MARY ROE, NATIONAL BILLIARD SUPPLY CO.,
Appellants.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

297 I.A. 648

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

In an action in replevin, tried by the court without a jury, there was a finding in favor of plaintiff and judgment entered accordingly.

On January 26, 1923, George Polos, Andrew Kolegus and Gus Siaperas became partners in a pool and billiard business. On July 15, 1924, Gus Siaperas dropped out of the partnership and plaintiff George Polos and defendant Andrew Kolegus agreed in writing to continue as partners in the operation of pool and billiard parlors at 39 South Dearborn street and at 326 South State street, both in Chicago. The operation of the business was discontinued in May, 1935. Plaintiff maintains that at that time the parties called in an attorney and that by verbal statements and by actions the partnership was dissolved and a complete settlement and disposition of all the partnership affairs was concluded. There is testimony that Kolegus accepted fourteen or sixteen pool tables and other equipment as his proportionate share of the assets, and that plaintiff accepted twenty-six or twenty-eight pool tables and other equipment and placed the same in storage with one Jesse Jost. The property

in dispute claimed by plaintiff is part of the twenty-six or twenty-eight tables and incidental equipment which plaintiff claims were awarded to him at the time of the dissolution. It is undisputed that in October, 1936, after the dissolution, Kolegus removed nine tables and the incidental equipment from the National Billiard Supply Company, where the property was stored, to the premises at 532 South State street, Chicago, and that he there resumed his former occupation of operating a pool and billiard parlor. He then mortgaged the tables and equipment to the Brunswick-Balke-Collender Company and in the mortgage warranted that he was the sole owner. These tables were a part of the fourteen or sixteen tables that had been given to Kolegus at the time the partnership business was terminated. Mr. James C. McGloon, an attorney practicing in Chicago, testified that on May 8, 1936, he was called to the place of business at 39 South Dearborn street; that Polos and Kolegus there told him that they were dissolving the partnership; that they had reached an agreement between themselves as to the division of the pool tables; that Polos was to take twenty-six tables and Kolegus fourteen tables; that they received $200 from the man who purchased the place and $100 from their landlord, which was given to them in consideration of their immediate removal from the premises; that he was paid $50 for his services. The witness stated that he asked Polos and Kolegus if they wanted him to draft a dissolution agreement and when he informed them that his fee would be $25 additional the matter of drafting such an agreement was dropped. Mr. McGloon quoted Kolegus as saying that "he was broke, he was all through, he didn't need no papers to dissolve the partnership."

Kolegus urges that replevin, being an action at law, cannot be maintained against one partner by another. We agree that one partner cannot maintain a replevin action against another in a

in dispute continued for a little [illegible]
twenty-eight [illegible] which [illegible]
claims were [illegible] in [illegible]
is undisputed that in October, 1956, [illegible]
Kolegua [illegible]
the National [illegible]
stored, [illegible]
that he there received his [illegible]
and billiard parlor. [illegible]
to the Brunswick-Balke-Collender [illegible]
warranted that he was the sole owner [illegible]
of the [illegible] to Kolegua
at the time the [illegible]
C. McGloon, an attorney [illegible]
May 8, 1956, he was [illegible]
Dearborn street; that [illegible]
were discussing the [illegible] the proceeds
between themselves as to the division of [illegible]
Polos was to take [illegible]
that they received [illegible]
$100 from their [illegible]
of their income [illegible]
for his services. [illegible]
Kolegua if they [illegible]
he informed them [illegible]
disclaim such an [illegible]
as saying that "he [illegible]
no papers to [illegible]".

Kolegua [illegible]
be maintained [illegible]
partner cannot maintain a right in [illegible]

matter relating to the partnership affairs until there has been a dissolution, followed by a settlement and a striking of a balance. There is evidence from which the trial court would have the right to decide that the parties had dissolved the partnership, divided the assets, and settled the accounts and partnership affairs; that they called Attorney McGloon and told him they were dissolving the partnership; that he consulted with them and they paid him for his services; that they made a settlement with the landlord and paid the bills; that the places of business were closed and the chattels sold or stored. The testimony on the issues is conflicting. The trial judge, who had an opportunity to see, hear and observe the witnesses, was in a better position to determine their credibility and the weight to be given their testimony.

Another point raised by Kolegus is that he paid the balance due on a chattel mortgage secured by the chattels taken on the replevin writ and that because of so doing he stands in the shoes of the mortgagee. He contends that before the chattels can be taken he must be reimbursed for the sum of $340 that he states he expended. While the partnership was in existence the partners gave two chattel mortgages covering various chattels, one to secure the payment of $1,000 and the other to secure the payment of $600. There is evidence that the partnership did not receive the full face amount of the loans, and some mention has been made that the transaction was tainted with usury. Plaintiff introduced evidence to the effect that the two mortgages were paid in full out of partnership assets. There was no foreclosure or sale of the mortgaged chattels. Kolegus testified that when he received notice from the storage man that a foreclosure was threatened he paid the balance which he said was due, together with some other expenses.

[illegible] matter relating to the [illegible] there has been a disconnection, followed by [illegible] balance. There is evidence [illegible] only in to the right to [illegible] ship, divided the [illegible] ship artists; that [illegible] were discharged [illegible] they paid him for his service [illegible] the lamplors and [illegible] closed and the obstacle [illegible] leaves [illegible] to see, based on observation [illegible] to determine [illegible] testimony.

[illegible] due on a certain [illegible] replying [illegible] of the month [illegible] he must be [illegible] While the [illegible] chattel mortgage [illegible] month of 1,000 [illegible] is evidence [illegible] amount of the [illegible] transmission [illegible] to the effect [illegible] particularly [illegible] mortgagee [illegible] from the [illegible] balance which is [illegible] suspense.

From an examination of the record we are satisfied that there was competent evidence from which the trial court could find that the debt to secure which the mortgages were given had been paid in full prior to the time that a foreclosure was threatened. Defendant quotes a statement by the trial judge which suggested that the proper tribunal in which to determine the difficulties and differences between the partners would be a court of chancery. He did make that statement. It is apparent that the statement was not the considered judgment of the court. The trial judge stated, in substance, that after carefully considering the testimony and reading a transcript of a portion of it he believed that the partnership had been terminated, and found for plaintiff. After announcing his finding, the court, in a colloquy with counsel for defendants, stated: "After all the testimony that has been offered to me that is the only conclusion, although there was no formal dissolution of the partnership." We have heretofore pointed out that there was no formal dissolution of the partnership. The final determination of the trial court and undoubtedly the judgment was that plaintiff had proved his case by a preponderance of the evidence, and from a careful perusal of the record we would not be warranted in disturbing that judgment. Therefore, the judgment of the Municipal court of Chicago is affirmed.

JUDGMENT AFFIRMED.

Friend, P. J., and Sullivan, J., concur.

From an examination of the record we are satisfied that there was competent evidence from which the trial court could find that the debt to secure which the mortgage was given had been paid in full prior to the time that [illegible] commenced. Defendant under a statement by the trial judge which represented that the proper testimony in which to determine the identities and differences between the [illegible] would be a court of chancery. He did make that statement. It is apparent that the statement was not the considered judgment of the court. The trial judge stated, in substance, that after carefully considering the testimony and reading a transcript of a portion of it he believed that the partnership had been terminated. We found for plaintiff. Prior announcing his finding, the court, in a colloquy with counsel for defendants, stated: "From all the evidence it has been offered to me that is the only conclusion, although there is no formal dissolution of the partnership." We have heretofore pointed out that there was no formal dissolution of the partnership. The final determination of the trial court and undoubtedly the judgment was that plaintiff had proved his case by a preponderance of the evidence, and from a careful perusal of the record we would not be warranted in disturbing the judgment. Therefore, the judgment of the Municipal Court of Chicago is affirmed.

JUDGMENT AFFIRMED.

Friend, P. J., and Gillis, J., concur.

40253

PEOPLE OF THE STATE OF ILLINOIS
ex rel. JOHN S. RUSCH,
Appellee,

v.

HARRY GUSTISON, JOHN CAPRA, JACK
SWIFT and CHARLES SALTZMAN,
Appellants.

APPEAL FROM COUNTY
COURT OF COOK COUNTY.

24A

297 I.A. 648

MR. JUSTICE BURKS DELIVERED THE OPINION OF THE COURT.

Respondents, Harry Gustison, John Capra, Jack Swift and Charles Saltzman, prosecute this appeal from a judgment of the County court of Cook county finding them guilty of contempt of court and sentencing each to serve one year in the common jail of Cook county.

On September 24, 1937, John S. Rusch, Chief Clerk of the Board of Election Commissioners, filed his verified petition against the judges and clerks of election for the 11th precinct of the 1st ward, Chicago, in the primary election of April 14, 1936, and charged respondents, as judges and clerks, with knowingly, fraudulently and unlawfully permitting votes to be cast more than once by six persons; knowingly, etc., permitting to vote six persons who were not qualified voters and whose names had been theretofore legally erased from the registers; knowingly, etc., permitting William McDonald to vote when his name did not appear in the registers; knowingly, etc., permitting votes to be cast in the names of four persons who were not registered in the precinct; knowingly, etc., permitting the record in poll books of names and addresses of several persons who did not appear to vote in the precinct; knowingly, etc., failing and refusing to have poll books

40252

PROPOSED [illegible]
on Vol. [illegible]

[illegible]

v.

MONEY [illegible]
SWIFT and [illegible]

[illegible] No. 649

No. [illegible]

Respondents, [illegible]
Charles Saltzman, [illegible]
County court of [illegible]
court and [illegible]
of Cook county.

On [illegible]
Board of [illegible]
against the [illegible]
of the last [illegible]
1950, one [illegible]
fraudulently and [illegible]
once by six [illegible]
who were [illegible]
legally [illegible]
fitness to [illegible]
registrar [illegible]
means of [illegible]
[illegible]
[illegible]
precinct; [illegible]

maintained by clerks under the supervision of judges; knowingly, etc., making a false canvass, tally, proclamation and return of votes; certifying to election commissioners vote cast in precinct not true and correct vote cast in precinct, and that differences between returns made by respondents and actual votes cast was caused by fraudulent acts of respondents.

On the same day the court entered an order that respondents and John Spizzirri (not apprehended) "be attached to show cause, if any they have, why they and each of them, as officers of the County Court, should not be punished for contempt." After trial, judgment was entered on March 24, 1938. The judgment order recited in substance that respondents Capra and Gustison, and John Spizzirri, served as judges of election and that respondents Swift and Saltzman served as clerks of election; that they knowingly, etc., permitted votes to be cast more than once by six persons; that they knowingly, etc., permitted two votes to be cast in the name of William McDonald; that they knowingly, etc., permitted six persons to vote whose names had therefore been legally erased from the registers; that they knowingly, etc., permitted the poll books to be maintained and written into after the close of the polls and permitted names of persons voting to be inserted only in one poll book during the voting; that they knowingly, etc., made false canvass, tally, proclamation and return of votes cast; that in 43 official Democratic ballots cross-marks before "Horner" were erased and cross-marks placed before "Bundesen;" that respondents knowingly, etc., failed to count the ballots as provided by law; that judges of election directed clerks to make entries of totals in official tally sheets first and later to enter necessary tally marks to equal totals. The order concluded by finding respondents guilty of contempt of court, made the rule absolute, and sentenced each to one year in the County jail.

On request of counsel for petitioner the trial court ordered the ballots to be counted under the direction of the chairman of the Board of Election Commissioners, which was done. The box of voted ballots contained 295 Democratic, 91 Republican, 1 Third Party, and 248 Proposition ballots, and at the time it was opened was bound by rope lengthwise and crosswise and tied into a knot, which was sealed with wax. Across the sides and at the bottom of the box was adhesive tape, signed across by two persons. The box had been previously opened for the Serritella recount. The latter was a candidate for election as Republican delegate to the National Convention in the district of which the 11th precinct of the 1st ward was a part. The box had a bundle of loose Republican ballots. The Democratic ballots were folded and strung on wire. The proposition ballots were not wired but were loose in the box. Each ballot showed a hole punched through the center, indicating that at one time the ballots had been strung on wire. The ballots were recounted and a report of the result made to the County judge. By stipulation the poll books, registers, tally sheets, applications by respondents for appointment, oaths, pay vouchers, and recount sheets were received in evidence. The parties also stipulated that the "box containing voted ballots and many seals of previous opening and resealing may be introduced in evidence as Exhibit 16 subject to objection of respondents as to any and all markings on box or contents."

Herman J. DeKoven, testified, for petitioner, that he was a watcher in the precinct; that he arrived before the voting started and remained until the next morning; that he did not see anything unusual or out of the ordinary; that he was in attendance all the time except for a few minutes when he went out for a meal.

Frank Davis, a witness for petitioner, related that he was a watcher; that he arrived at the polling place around six in the

[illegible]

ordered the ballots [illegible]

obstruction of the [illegible]

The box of voting [illegible]

I then [illegible]

opened [illegible]

[illegible]

bottom [illegible]

The box [illegible]

latter [illegible]

[illegible]

the law [illegible]

ballots. [illegible]

The proceedings [illegible]

[illegible]

that at one [illegible]

were recounted [illegible]

by [illegible]

by [illegible]

sheets were [illegible]

the "box [illegible]

and vote [illegible]

objection [illegible]

tance."

[illegible]

voters in [illegible]

and [illegible]

[illegible]

time except [illegible]

[illegible]

a voter; [illegible]

morning and remained there until three or four the following morning; that he made note of the conduct of the officials; that he noticed that the ballot box was not locked; that when people came in they were asked no questions except names and addresses; that the judges were in the habit of initialing ballots - sometimes as many as 25 - in advance of the arrival of the voters; that voters were assisted in the booth with only one judge present; that a few women voters were assisted who did not want assistance; that 3 of these protested; that 18 people were assisted during the day; that after the ballots were taken out and unfolded the counting was in accordance with the rules for the first few hours, after which everybody began to get tired and they split into teams; that they counted ballots and took net totals and called such totals to the clerk instead of counting each individual ballot; that early in the morning Ralph Spizzirri, the Democratic precinct captain, assisted in counting ballots; that he counted the ballots and called off totals; that witness noted Harry Gustison making crosses on Republic ballots; that the crosses were being made by Gustison on the Republican ballot, in the lower right-hand corner of the ballot, in the locality where the name of Ferritella appeared; that Swift, a clerk, was under the influence of liquor consumed the night before, or some nervous disorder; that he was in very bad physical condition; that he could hardly write; that Swift appeared sick during the entire day except for about two hours when he was absent from the polling place; that he returned shortly after the polls closed; that he did not work on the tally sheets; that during the evening he sat around "in terrible condition and couldn't do anything. He was very nervous;" that "there were three judges, Ralph Spizzeri, Capra and Gustison. During the day Spizzeri spent most of the time by the ballot box;" that the ballots were initialed by all three judges, but mostly by Spizzirri; that his recollection is

that Gustison sat at the table with records; that respondent Saltzman wrote names in the poll books as the people came in; that there was only one clerk in the polling place at times; that Capra helped give out ballots; that "there were some watchers there from Herner's office and two watchers from the Election Commission, whose names I do not know;" that Capra assisted individuals in the booth without another judge being present; that witness saw poll books in the office of the election commissioners about two weeks before he testified; that on looking at the poll books he remembered that when Swift returned after the polls closed he copied two or three pages of names from Saltzman's book; that pages 10 and 11 of Exhibit 2 are the pages filled in; that after the polls closed Swift was more nervous than in the morning; that during the day, beginning with line 115, both poll books were not used; that at times both clerks were absent and on returning, Saltzman, at the direction of Ralph Spizzirri, took his poll book and copied names from the qualified voters list, and when Swift returned he in turn copied the names taken from the voters list; that the polling place was a store about twenty feet across, usually used as a laundry; that witness "noticed Swift had jitters. In my opinion he was in no mental or physical condition to do any work. Saw him writing in book after polls closed. Made note of it at time. Have a vivid recollection of practically all his acts during day because he was in terrible physical condition." While witness Davis testified that Ralph Spizzirri was a judge, he undoubtedly was confused, and meant John Spizzirri. Ralph Spizzirri was the precinct captain.

Frank Davis also stated that another watcher, also named Davis, was present in the polling place; that he did not testify; that Frank Davis was informed by Mr. McQueeny (detective), their superior, that his namesake at the time of the trial was in Arkansas. At the time of the trial Ralph Spizzirri, the Democratic

precinct captain, was in the County hospital in a serious condition and could not be moved.

Various stipulations were stated. Forty-three ballots were admitted in evidence and examined by the court. As to that phase of the case the abstract shows: "Mr. Goodman [for respondents]: Well, I will stipulate, your Honor, to the erasures. The question is, who did it. (Statement by Mr. Cashen that gray ballot box containing used ballots, People's Exhibit 16, opened at direction of court. Box bound with rope on four sides and sealed with sealing wax, with initials of John P. Daly, attorney for Election Commissioners. Further statement that if said Daly would testify, he would state that box is in same condition as when he sealed it. Court examines ballots which are marked as Exhibits 1 to 43 and box is sealed with tape and sealing wax.)"

Respondent Jack Swift (one of the clerks) testified that he is a hotel clerk; that he served in the United States army over seas during the World War; that he lived in the locality seven years; that he went to the polling place at 6 in the morning and he was pretty sick but thought he "could stick it through;" that he had been drinking; that he had the shakes and was jittery; that during the day he lay down a couple of times, once for an hour; that he stopped and rested several times during the morning; that he felt nauseated; that he assisted on the poll book and the tally off and on; that so far as he knew nothing irregular took place; that he had nothing to do with erasing ballots; that he did not erase the name "Horner," nor did he see anyone else do so; that he did not have knowledge that such a thing took place; that he was sick and probably careless but did not commit any wilful disobedience; that he felt he could work through and feel better during the day; that he stayed there all night and part of the morning and helped on the tally; that it was the second time that he had acted as a clerk of election;

precious capital, [illegible] [illegible] [illegible]

that he did not drink liquor the day of the election; that he did not touch a ballot; that he was behind in making entries in the poll book because he was sick and that the judges of election probably put a substitute in his place.

Harry Gustison stated that he was married, 28 years of age; that he was the manager of a furnished apartment building; that he had never been previously arrested; that he served as Democratic judge of election; that he received a book of instructions through the mails; that he did not do any erasing; that he was willing to take a lie detector test; that he did not see anyone vote twice; that some "colored people there have same names as white" people; that he did not see anyone rub out "Horner" and put in "Sundesson;" that he did not know of anyone voting who was not qualified; that he did not know of any person casting more than one vote or of anybody voting who was not registered; that he thought he wrote two names in the poll book and that he tried to faithfully follow the instructions; that he made an application to the election commissioners to be appointed; that at the time he stated he was married, whereas the truth was that he was not married; that he did not know anything about any changes in the ballots; that the ballots were counted in groups; that he did some counting and some tallying; that there was a commotion about 1 o'clock in the morning when a man lost a fountain pen; that he looked during the day to see whether people who came in to vote were registered; that he did not think Ralph Spizzirri did calling or counting of ballots. Two witnesses testified as to the good reputation of Gustison.

Charles Waltzman, the Republican clerk, testified that Ralph Spizzirri the night before, stated that a clerk was sick and asked him if he wanted to work; that he sat at the poll book and waited for instructions of the judge; that when the judge said "check" he would write the name in the book; that as far as he

could remember he saw a different party every time he wrote a name in the book; that he did not knowingly and fraudulently permit anyone to vote more than once, nor did he permit anyone to vote whose name had been erased, nor did he permit illiam McDonald to vote a second time, nor did he permit votes to be cast in the names of persons not registered; that during the day he went out for twenty minutes with permission of the judges; that when he got back a judge handed him five or six persons' names and stated they had voted and that the names should be entered in the book, which he did; that he did not go out after the polls closed; that he sat and opened the tally book and waited while the judges sorted out ballots; that he worked until 3 or 4 o'clock in the morning; that he had never been arrested previously; that he served as clerk of election in the same precinct in the November, 1936, election; that he "filed application for election clerk this year and gave same name and address. Was then placed under arrest. Prior to that time had no knowledge I was charged with irregularities;" that "Mr. Spizzirri did count some of the ballots;" that the judges gave witness the totals and that after putting the totals down he put in the tally marks; that he did not take each vote as it was counted; that he could not say that he did everything according to the rules; that he had no recollection of seeing ballots changed, that such might have happened without his seeing the occurrence; that Swift copied names from witness's book after 5 o'clock; that witness put down the names as the people came in and did not obtain the names from the printed list.

John Cura, Republican judge, related that he was present at the counting of the ballots; that he was at the end of a 15-foot table and that another crew counted at the other end; that he had no knowledge of any irregularities; that he did not know any occasion on which a person voted who was not qualified to vote; that he

attempted to comply with the law; that he had previously served as a judge or clerk in 1934 and 1938; that he did not see anybody erase cross-marks before the name of "Horner" and place them before the name of "Bundesen;" that he did not see anybody go into a booth to advise voters; that he had charge of one register; that he did not see anyone changing ballots; that he counted some democratic ballots; that Jack Swift helped him; that he did not know if Ralph Spizzerri, precinct captain, helped count ballots; that John Spizzerri, a judge, counted ballots.

The points urged as grounds for reversal are (1) that the finding of the court is contrary to the evidence; (2) that the court erred in receiving the ballots in evidence, and (3) that the punishment inflicted is grossly excessive. While proceedings of this type are in the nature of civil cases, we have held that the petitioner is required to produce most convincing evidence of the truth of the charges. Two of the three observers for the McQueeny detective agency testified: one of them to the effect that he did not see any irregularities, and the other testified about various infractions of the election laws. Respondents admitted some irregularities but claimed as to these that they acted in good faith. In the main they denied the charges. Outside of the testimony any other evidence of guilt was necessarily drawn from the exhibits. Although the observer Davis made a written report to his superior at the time of the primary election, the petition was not filed until about a year and a half later, and the case was not tried until almost two years after the election. In the meantime at least one of the respondents served as clerk at a subsequent election and made application to serve at the April, 1938, primary. It would be more satisfactory if cases of this character were tried within a reasonable time after discovery of the alleged misconduct. Respondent Jack Swift, according to the testimony of all the witnesses, was quite ill, and during most of

the time he did not function as a clerk. The court found that on 43 ballots cross-marks before the name "Horner" were erased and cross-marks placed before the name "Bundesen." The ballots were inspected by the court, and it was stipulated that erasures appeared thereon. There was no testimony as to how, when, or by whom, the erasures were made, ~~and there is no statement by the court as to whether the inspection of the ballots showed that the marks before the name of "Bundesen" were all made by the same pen or pencil.~~ It is interesting to note that the petition that is the foundation of the rule to show cause does not specifically charge respondents with altering ballots. Outside of what could be gleaned from an examination of the ballots the only evidence on the subject is the testimony of Frank Davis, that he saw Republican ballots being altered in the lower right-hand corner. No witness testified as to any erasures or alterations on any Democratic ballots. The recount report by Mr. McKay (chairman of elections commissioners) shows that Bundesen lost 3 votes and Horner gained 1 vote. He does not make any statement as to altered ballots.

In connection with the finding that 43 Democratic ballots were altered it is timely to discuss the proposition advanced by respondents that the court erred in receiving such ballots in evidence. The point was not raised at the trial. There it was stipulated that the "box containing voted ballots and many seals of previous opening and resealing may be introduced in evidence as exhibit 16 subject to objection of respondents as to any and all markings on box or contents." This stipulation clearly reserved to respondents the right to object as to any and all markings on the box and on the contents of the box. We do not find any objection to the admission of the ballots. It is manifest that no error was committed in receiving the ballots in evidence.

However, in determining whether the testimony offered by

respondents absolves them from blame in the alteration of the 43 Democratic ballots the trial court should consider all the facts and circumstances, including the fact that the ballot box had been previously opened. All respondents deny altering ballots and deny seeing anyone else alter ballots or knowing anything about the alteration of ballots. One watcher, DeKoven, testified that he did not see any wrongdoing; and the other watcher, Davis, testified that he saw Republican ballots being altered. On page 200 of the record appears a statement by counsel for petitioner, as follows: "I think it is easy to point out to the Court not only matters in evidence that would sustain the prosecution, but matters that sustain the allegations. I can frankly see from my experiences that these defendants and respondents, although I felt they didn't tell the truth, I think they came nearer telling the truth than respondents in other similar circumstances. If there was evidence of some one changing these ballots that were marked for Judge Horner and changed to Bundesen, it seems to me that would be a case where in Your Honor's judgment very serious punishment should be meted out. But in view of the circumstances, I think the respondents have established here by their own witness, that he was either drunk or sick and was derelict in his duty and it would amount to gross carelessness and negligence. As to the other clerk, the fact that they divided up into teams and put down the totals that were given to them by someone else, is in itself a violation of the law, and violation of the duty as clerk, and I think it is a case where the Court should mete out punishment to be commensurate with the evidence produced in this case." Respondents presented evidence that they did not know of or participate in the alteration of ballots, and one of the watchers corroborates their statement. The other watcher saw alterations made in the Republican ballots, but there is no finding by the court as to the Republican ballots. The ballot box had been

[illegible]

opened in the "Serritella" contest. There is no evidence as to how the ballots were preserved from the time they were delivered to the election commissioners' office on the morning after the primary, and there is only fragmentary evidence as to the preservation and guarding of the ballot box containing the voted ballots. Mr. Joseph Tauer, assistant chief clerk of the Board of Election Commissioners, stated that the box had been previously opened and that it had been sealed with tape on both sides and bottom. The parties stipulated that if Mr. John J. Daly, an attorney for the election commissioners, appeared he would testify that the ballot box is in the same condition as when he signed his name and put his seal on the same. The record in the instant case shows that the ballot box was opened on March 7, 1938, for the purpose of the recount. At the conclusion of the recount the box was sealed with tape, and signed by Mr. Daly for the election commissioners and by Mr. Dowd for respondents. We are not called upon to decide as to whether the rule laid down by our supreme court as to the integrity of the ballot box should be applied in a case such as this. In the case at bar we are not considering an election contest. In view of the denials of respondents and the testimony of Donovan and Davis (which tends to support the testimony of respondents), we believe that it was incumbent on petitioner to show, in rebuttal, that the ballots were so guarded and protected that it would be improbable that any persons other than respondents had an opportunity to alter or to permit to be altered the 43 ballots that were altered. In announcing his finding in an oral statement at the close of the trial the court emphasized the part of the case relating to the alteration of ballots. Undoubtedly that finding carried considerable weight in determining the punishment to be meted out. No one will deny that the alteration of a ballot is a serious offense and deserving of severe punishment. Such an act would, in its very

[illegible]

nature, be deliberate, and could not be excused on the basis of carelessness or mistake. It would defeat the right of a citizen to cast a ballot according to his or her choice and to have it counted as cast. From a careful consideration of the entire record we are of the opinion that the proof as to the alteration of the 43 Democratic ballots was not of such convincing character as to warrant a finding that respondents were guilty thereof. As previously indicated, they were not specifically charged with any such misconduct.

As to the charge that the clerks and judges permitted persons to vote who were not registered, respondents ask us to note the following contentions: "The name of Henry Beckman does not appear in the register. The name of Henry Beckerman, 1052 So. Michigan venue does appear on page 1, line 4 of both registers, under the initial 'B'. The name Allen Myrick does not appear in the register. The registers do contain the name of Ella Myrick, 1439 So. Michigan venue at line 27 of page 3, under the initial 'M'. The poll books do not contain the name of Frank McIlvane as charged by petitioner. They do contain the name of Frank McLarens. The registers contain the name of Frank McIlvane, 1517 So. Michigan Avenue, at page 2, line 3, under the symbol 'Mc'. This name appears to have a line drawn through the center of it in the register, but the register does not have the date of removal or the ordinary stamp showing removal by order of the Election Commissioners. The name of Mary Murray does not appear in the register. But it should be noticed that on page 3 of the registers, under the initial 'M', line 72, appears the name of Murray, Caroline, 1500 So. Wabash avenue. Line 23 immediately below contains the name of Ming, Mary, 1517 So. Michigan venue. The name of Caroline Murray has a line drawn through the middle in the register, without any stamp or date of removal. The name Mary Ming has no line drawn through it.

[illegible]

[illegible]

to [illegible]

[illegible]

[illegible]

of the [illegible]

as to [illegible] therefor.

as previously indicated.

any such misconduct.

[illegible]

persons to vote [illegible]

note the [illegible]

not appear [illegible]

So. Michigan Avenue [illegible]

under the [illegible]

registrar. [illegible]

So. Michigan Avenue [illegible]

The poll book [illegible]

by petitioner. [illegible]

registrar [illegible]

Avenue, on page 1, line [illegible]

to have a line [illegible]

the registrar [illegible]

stamp showing [illegible]

name of Mary [illegible] But [illegible]

be noticed [illegible]

line 32, [illegible]

Avenue. Line [illegible]

1217 So. Michigan Avenue [illegible]

drawn through [illegible]

date of removal. [illegible]

Considering the adverse conditions under which these officials worked, and the fatigue from which they suffered, certainly it is conceivable, and even probable, that they made an error in the poll books by combining the information contained in these two adjacent lines of the registers." Answering the charge that respondents permitted persons to vote whose names had theretofore been erased from the registers they maintain that on some of these the line was drawn through the name instead of being underscored, as required by the rules.

An examination of the report of the recount shows certain discrepancies between the canvass and return by the precinct election board and the votes cast as shown by the recount. It will be observed, however, that in many instances candidates who were unopposed lost or gained votes. Roosevelt (unopposed) lost 14 votes; Senator Lewis lost 1 vote; Kerner, for attorney general (unopposed), lost 26 votes; each of the three candidates for congressman at large gained; Lindheimer, for county treasurer (unopposed), lost 41 votes; Conroy, for clerk of the Circuit court (unopposed), lost 30 votes; Lintak, for clerk of the Superior court (unopposed), lost 42 votes; Moran, for bailiff of the Municipal court (unopposed), lost 52 votes; Gill, for clerk of the Municipal court (unopposed), lost 59 votes; Bundesen, for Governor, lost 3 votes, and Horner gained 1 vote. A comparison of the vote as returned by the officials of the 11th precinct and as recast under the direction of Mr. McKay shows discrepancies, but the nature of the discrepancies leaves grave doubt as to whether they were caused by deliberate misconduct. The record clearly establishes that respondents were grossly careless in the performance of their duties. In People ex rel. Busch v. Greenzeit, 277 Ill. App. 479, 491, this court said: "Under section 13 [ch. 46, par. 186, Ill. Rev. Stat. 1937] the trial court had the right and power to find plaintiff in error guilty of

misbehavior, even though he did not find that the 'misbehavior' involved an act or acts of a criminal character." It is the duty of the judges and clerks of election to so conduct themselves and to so keep the record of votes cast that only persons entitled to vote may do so, and that those who do vote have their votes honestly counted. A great deal of the confusion and the violation of the rules arose from the fact that the clerk, Jack Swift, was very ill. While such condition, brought on by excessive drinking on the previous day, does not excuse wrongdoing or gross negligence, nevertheless, it should be taken into consideration in fixing the punishment. The clerks and judges worked long hours and their duties were onerous. Watchers from the McSweeny detective agency and from the election commissioners' office and police department were present from the opening of the polls until the ballots were sent to the office of the election commissioners. It is strange that no effort was made to correct the condition existing on account of the illness of Swift. While the evidence of misbehavior warranted the court in finding respondents guilty, we are of the opinion that it was not of such character as to warrant the punishment imposed.

Upon a consideration of all the evidence we are of the opinion that if respondent Jack Swift is sentenced to the County jail for a period of sixty days, and each of the other respondents for a period of ninety days, the ends of justice will be served.

The judgment of the County court of Cook county is reversed and the cause is remanded for further proceedings in accordance with the views herein expressed.

JUDGMENT REVERSED AND CAUSE REMANDED.

Friend, P. J., and Sullivan, J., concur.

39843

MILTON G. LEIBSON,
Appellee,

v.

METROPOLITAN LIFE INSURANCE COMPANY, a corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

297 I.A. 649

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This appeal by defendant, Metropolitan Life Insurance Company, seeks to reverse a judgment for $400 entered against it in an action tried by the court without a jury, wherein plaintiff, Milton G. Leibson, claimed he was entitled to the payment of certain disability benefits under a life insurance policy issued to him by defendant. Plaintiff filed a notice of cross appeal, in which he assigned as error the failure of the trial court to include in the judgment as part of the damages sustained by him a premium on said policy in the sum of $92.91, which he paid during the period of his disability.

Plaintiff's statement of claim alleged in substance that on September 13, 1926, defendant executed and delivered to him an insurance policy wherein and whereby his life was insured by defendant company; and that attached to said policy and made a part thereof was a supplemental contract, which was captioned, "Total and Permanent Disability - WAIVER OF PREMIUMS AND PAYMENT OF MONTHLY INCOME," and contained the following pertinent provisions:

"METROPOLITAN LIFE INSURANCE COMPANY

"IN CONSIDERATION of the application for this Contract,

39643

MILTON C. [illegible],
appellee,

v.

METROPOLITAN [illegible]
COMPANY, a corporation,
appellant.

MR. JUSTICE [illegible] delivered the opinion of the court.

This appeal by [illegible] Life Insurance Company, seeks to [illegible] entered a [illegible] it in an action tried [illegible] a jury, wherein plaintiff, Milton [illegible], sued [illegible] relative to the payment of certain disability [illegible] under a life insurance policy issued to him by [illegible]. [illegible] filed a notice of cross appeal, in which he [illegible] error the failure of the trial court to include in [illegible] the amount of the damages sustained [illegible] of the policy in the sum of $92.01, which [illegible] of his disability.

Plaintiff [illegible] that on September [illegible] to him an insurance [illegible] insured by defendant [illegible] and made a part [illegible] capacity, "total [illegible] AND LIFE INSURANCE COMPANY [illegible] shall be allowing permanent provisions:

"[illegible]

"IN [illegible] the insurance,

as contained in the application for said Policy, the latter being the basis for the issuance hereof, and in consideration of EIGHT dollars and FIFTEEN cents, payable ANN as an additional premium herefor, such payment being simultaneous with, and under the same conditions as, the regular premium under the said Policy, except as hereinafter provided.

"HEREBY AGREES, that upon receipt by the Company at its Home Office in the City of New York of due proof on forms, which will be furnished by the Company, on request, that the insured has, while said Policy and this Supplementary Contract are in full force and prior to the anniversary date of said Policy nearest to the sixtieth birthday of the insured, become totally and permanently disabled, as the result of bodily injury or disease occurring and originating after the issuance of said Policy, so as to be prevented thereby from engaging in any occupation and performing any work for compensation or profit, and that such disability has already continued uninterruptedly for a period of at least three months, it will, during the continuance of such disability, ***. [Here follow provisions for waiver of premiums and payment of disability benefits.]

"***

"Notwithstanding that proof of disability may have been accepted by the Company as satisfactory, the insured shall at any time, on demand from the Company, furnish due proof of the continuance of such disability, but after such disability shall have continued for two full years the Company will not demand such proof more often than once in each subsequent year. If the insured shall fail to furnish such proof, or if the insured shall be able to perform any work or engage in any business whatsoever for compensation or profit, the monthly income herein provided shall immediately cease, and all premiums thereafter falling due shall be payable according to the terms of said Policy and of this Supplementary Contract." (Italics ours.)

Plaintiff's statement of claim further alleged that on August 4, 1933, while said policy was in force, he became totally and permanently disabled as the result of bodily injury so as to be prevented thereby from engaging in any occupation and performing any work for compensation or profit, which total and permanent disability continued from said August 4, 1933, for a period of eight months; that in the month of November, 1933, he gave defendant due notice in writing on forms provided by it, that he had become totally and permanently disabled as a result of bodily injury, and delivered to defendant due proof of his disability; and that the defendant company became liable to pay him $50 monthly for the period of eight months, beginning August 4,

[illegible]

"W[illegible] BY [illegible]

Home of [illegible] in the [illegible]
will be furnished by [illegible]
has, while [illegible]
full force and [illegible]
[illegible]
and permanently [illegible]
disease [illegible]
policy [illegible]
occupation [illegible]
and that such disability [illegible]
for a period [illegible]
[illegible]
waive of [illegible]

***

"[illegible]
accepted by the company [illegible]
time, on coming [illegible] proof of the [illegible]
[illegible]
have [illegible]
such proof [illegible]
the insured shall [illegible]
shall be able [illegible]
[illegible]
proving [illegible]
failing [illegible]
policy and of this [illegible]

Plaintiff's [illegible] alleged that on

August [illegible]

and permanently [illegible]

[illegible]

and performing [illegible]

and permanent [illegible]

a period of [illegible]

gave [illegible]

he has become [illegible]

bodily injury, [illegible]

ability; and [illegible]

$50 monthly for the period [illegible]

1933, and also $92.81 paid by him as premium on his policy during said period of his disability.

Defendant's affidavit of merits, after admitting the issuance of the policy to plaintiff, denied that it received due proof that the insured became totally and permanently disabled so as to be prevented from engaging in any occupation or performing any work for compensation or profit. It further denied that plaintiff was or is totally and permanently disabled so as to be prevented from engaging in any occupation or performing any work for compensation or profit. It then alleged that plaintiff was not and is not now totally and permanently disabled.

Plaintiff is in the ladies' ready-to-wear business and is forty years old and married. On August 4, 1933, he was in a collision at Coatesville, Pennsylvania, in which his arm was broken in five places. He was taken to the Coatesville Hospital, where an operation was performed on his arm, which was then placed in a cast. He remained three weeks at that hospital and then returned to Chicago. After being in Chicago for about a week he went to Mount Sinai Hospital for treatment for three weeks. He was not able to use his arm for a period of eight months after the accident. He had some gall bladder trouble after he came back from Coatesville. He engaged in no gainful occupation during the eight months subsequent to August 4, 1933. When he returned to his employment after said period, he was paid the same salary of $90 a week that he had received before the accident.

It must be borne in mind at the outset that the insurance policy under consideration is not an ordinary accident and health policy which provides coverage for partial or total disability of either a temporary or permanent nature. The evident purpose of the supplemental contract providing for the payment of total and permanent disability benefits, which was issued to plaintiff

1933, and the social [illegible] after [illegible] said period or like [illegible].

[illegible] the [illegible] ignorance of the [illegible] proof that the [illegible] so as to be proved [illegible] forming any work [illegible] that plaintiff [illegible] to be prevented from [illegible] work for company [illegible] was not and is not [illegible].

Plaintiff [illegible] forty years [illegible] collision [illegible] broken in five [illegible] where an operation [illegible] in a case. No [illegible] returned to Minot [illegible] went to Mount [illegible] was not able to work [illegible] the social [illegible] back from Jamestown [illegible] the eight months [illegible] to his employment [illegible] of 90 a week that [illegible].

It must be borne in mind [illegible] policy under [illegible] policy which covers [illegible] of either a temporary [illegible] of the employee [illegible] and permanent disability [illegible].

upon the payment of an additional annual premium of $8.15 and made a part of his life insurance policy, was to protect him from financial loss caused by disability of the character specified in said contract. That plaintiff was totally disabled for a period of eight months is not seriously questioned, but it is stated in defendant's brief that it "refused to make the payments sued for here for the obvious reason that the disability was not a permanent disability." Therefore, the vital question presented for our determination is the meaning of the word "permanent" as used in a contract of the character now before us, construed according to its nature and in relation to the subject matter of the contract.

A contract of insurance containing provisions practically identical with those contained in the policy here, including the provision for the payment of benefits for total and permanent disability, was considered and passed upon in Maze v. Equitable Life Insurance Co. of Iowa, 246 N. W. 737, 188 Minn. 139. There the court said at pp. 141-2-3-4,7-8 and 152, of the latter report:

"For a period of 23 months, from about June 2, 1929, to about June 1, 1931, plaintiff by reason of an infirmity was totally disabled. On October 19, 1929, he filled out and gave to defendant proof of disability blanks furnished by defendant and thereby made claim for disability benefits on the basis that he was totally and permanently disabled since June 30, 1929, such disability then having existed for more than 60 days. It is conceded that during said 23 months plaintiff was totally disabled. The difficulty is whether such disability was permanent. Plaintiff claimed in his sworn statement that it was. At the time when he furnished such statement neither he nor his doctor knew how long his disability would continue. About 19 months later, on or about June 1, 1931, the disability had ceased, and soon thereafter plaintiff resumed his business as a dentist. This action was commenced about October 1, 1931.

"The theory of the plaintiff is that the conceded total disability which had continued for more than 60 days and continued to and existed at the time he made such proof of claim for disability benefits and was then of an indefinite duration, was permanent within the language of the policy. This defendant denies and suggests that since the disability ceased before the commencement of this action plaintiff cannot recover upon the theory of total and permanent disability within the language of the policy.

upon the payment of [illegible] premium of [illegible] made a part of his life insurance policy, [illegible] from [illegible] filed in said court. [illegible] a period of six months in [illegible] stated in defendant's [illegible] and for been for the [illegible] a permanent disability." [illegible] for our determination [illegible] used "permanent" as used in a court of [illegible] according to its [illegible] the court.

A number of [illegible] provisions practically identical with those [illegible] filed here, including the provision for the payment of benefits [illegible] and permanent disability, was considered [illegible] v. Equitable Life Insurance Co. of Iowa, [illegible] 1929, [illegible] 227. There the court said at pp. [illegible] of the letter report:

> "For a period of [illegible] about June 1, 1928, [illegible] totally disabled. [illegible] to defendant proof of disability [illegible] and thereby [illegible] he was totally and permanently disabled [illegible] such disability then [illegible] concerned that [illegible] abled. The difficulty [illegible] Plaintiff claimed in [illegible] time when he [illegible] knew how long [illegible] later, on or about June 1, [illegible] noon thereafter [illegible] action was [illegible]
>
> "The theory of the plaintiff [illegible] disability which [illegible] used to and exist [illegible] disability be [illegible] permanent within [illegible] denies and suggests [illegible] commencement of this [illegible] theory of total and permanent disability [illegible] of the policy.

"A literal construction of the words 'totally disabled *** so that he will thereby be permanently, wholly and continuously prevented from engaging in any occupation,' etc. would necessarily preclude plaintiff's recovery.

"It may be noted that the words 'totally disabled' when used in such a policy are not to be literally construed so as to mean a state of absolute helplessness, but rather a state of inability to do all the substantial and material acts necessary to the carrying on of the insured's calling in substantially his customary and usual manner. 79 A. L. R. Anno. 857. This is recognized as the liberal rule of construction which is followed in Minnesota. Carson v. New York L. Ins. Co., 162 Minn. 458, 203 N. W. 209. In other words, under such liberal construction, total disability to engage in any occupation or work for compensation or profit does not mean that the insured person must be wholly helpless. He may be able to perform some parts of an occupation, yet he may be held to be totally disabled unless he is able to perform the substantial or material parts of such gainful occupation or work with reasonable continuity. Wilson v. Metropolitan L. Ins. Co., 187 Minn. 462, 245 N. W. 826. This, however, is important in this case only as indicating the tendency of the court toward liberal construction.

"***

"Defendant says that plaintiff's disability was temporary, which is the antithesis of permanent. Permanent usually means forever, an absolute perpetuity, something continuing in the same state or without any change that destroys form or character, something lasting, something to remain as it is, an antonym to temporary.

"We are of the opinion, however, that the meaning of the word 'permanent' as used in a contract of the character now before us is to be construed according to its nature and in its relation to the subject matter of the contract. (Citing cases.)

"Defendant agrees to waive payment of premiums and make the monthly payments under specific conditions, and when? 'During the continuance of such disability.' This language does not indicate that defendant meant to say in its policy that the disability must last forever, to the end or for life. But it would seem from this and other provisions that defendant rather contemplated that if plaintiff was so totally disabled for a period of 60 days - apparently a waiting period of that length - the insured would be in a position to claim permanent disability.

"But there is another still more persuasive provision in the policy which reads:

"'The company may at any time and from time to time, but not oftener than once a year, demand due proof of such continued disability, and upon failure to furnish such proof, or if it appears that the insured is no longer wholly disabled as aforesaid, no further premiums shall be waived nor income payments made.'

"This clause carries the implication that the insurer contemplated that disability might terminate, in which event the waiver of the payment of premiums would come to an end, and the insured would have to begin to pay premiums again. It contem-

[illegible]

"It may be noted [illegible] used in such a policy [illegible] mean a state of [illegible] inability to [illegible] to the carrying on of the [illegible] customary and usual [illegible] recognized in the [illegible] in Minnesota. [illegible] 203 N. W. 203. In other [illegible] total disability to [illegible] work for compensation or profit [illegible] be wholly helpless. [illegible] occupation, [illegible] is able to perform [illegible] gainful occupation [illegible] v. Metropolitan [illegible] 886. However, in interpreting [illegible] denoy of the [illegible]

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"Defendants argue that [illegible] ity was temporary, which is the [illegible] meant forever, [illegible] the same state or [illegible] character, [illegible] an autonym to temporary.

"As part of the [illegible] word 'permanent' [illegible] na is to be construed [illegible] to the subject matter of the [illegible]

"Defendant [illegible] the monthly payment [illegible] the continuance of [illegible] indicate that [illegible] ability must last [illegible] been from this [illegible] templated that [illegible] of 60 days - [illegible] aured would be in a position [illegible]

"But there is [illegible] the policy which [illegible]

"'The [illegible] not oftener than [illegible] disability, and [illegible] appears that [illegible] said, no further [illegible] made.'

"This [illegible] construed that the insurer [illegible] waiver of the [illegible] insured would have [illegible] premium [illegible]. It contem-

plates that the disability, proof of which would entitle the insured to the benefits provided, might not last forever but might end, and after the cessation of the total disability the benefits would cease. This provision must also be read in connection with the words which provide for the $100 monthly payments 'during the continuance of such disability.'

"***

"We are of the opinion that the authorities support the conclusion that in insurance parlance, when used in such a policy as now before us, the words 'totally and permanently disabled' contemplate a disability at the time of the continuance of the claim, which reasonably satisfies a fair and impartial mind that the insured is then totally disabled and may reasonably be expected to continue in such condition for at least an indefinite period of time. The vital question thus involved must be determined on the evidence in each individual case. It necessarily follows that such a policy contemplates the accrual of liability for instalment payments under conditions which may eventually prove temporary only, although at the time indicative of permanency. As said in the Hawkins case, 205 Iowa, 760, 763, 218 N. W. 313:

"'Fairness to the policyholder requires that reasonable evidence of permanency be accepted, and the benefit paid, so long as such apparent permanency exists; but that, if it later appears that the seeming permanent condition is not such, then the company shall be no longer held to continue paying benefits.' ***

"If an insured, under such a policy as here involved, has been totally disabled for a period of 60 days, and proves by competent evidence the nature and character of such disability, as far as is known or may reasonably be ascertained, and that it would probably or may continue for life, or that its duration may reasonably be expected to continue indefinitely, he is entitled to recover installment payments as one who is totally and permanently disabled. Subsequent recovery, even before trial, does not destroy the insured's cause of action, though it terminates the accrual of subsequent instalment payments thereunder. The insurer is not required to pay after the disability ceases, and it is adequately protected by the language of the policy. Total and permanent disability under such a policy contemplates a physical or mental condition as a general rule at the time of the making of the claim, but not necessarily confined thereto, and relating to the period of the duration of such alleged disability, Each case must stand upon its own merits, and the evidence usually presents a question of fact.

"Such is our conception of what the parties to such a contract must have had in their minds. It provided that the insured should have the benefit of his seeming condition while it continued, but it protected the insurer against payments if the condition proved, as possible, to be temporary. A fair interpretation of the policy is that the parties intended payment to be made as long as an apparent permanency lasted; and that if time proves such seeming permanent condition is not such, then payments cease."

In Johnson v. Mutual Trust Life Ins. Co., 269 Ill.

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"[illegible]

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payments [illegible]
permanent [illegible]

In Johnson [illegible]

App. 471., in passing upon a supplemental insurance contract which contained provisions for benefits on account of total and permanent disability, the court said at pp. 474 and 475:

"It is urged by the appellant that the appellee cannot recover unless he has established that he will be disabled the remainder of his life.

"If that was the intention of the insurance company in entering into the contract of insurance, then it would be very difficult to determine whether or not appellee was permanently disabled, in view of the terms and conditions of the policy, until after his death.

"This contention cannot be sustained because the provisions of the policy - which is the contract between the parties - makes no such requirement. Under the paragraph 'Waiver of premium' it is provided that 'the company will, during the continuance of the disability, waive payment,' etc.

"Under the paragraph 'Income to Insured' it is provided that 'the company will, during *** the continuance of such disability, pay' etc.

"Under the paragraph 'Recovery from Disability' it is provided that 'although the proof of total and permanent disability may have been accepted by the company as satisfactory *** and if it shall appear *** that the insured is able to perform work, etc. *** no further premium will be waived or income paid.'

"These provisions clearly demonstrate that the contention now made by the complainant is not in harmony with nor contemplated by the provisions of the contract. It clearly indicates that the parties intended by this contract that whenever it should appear that the plaintiff was totally disabled and that such disability would, so far as it was possible to ascertain at the time, be permanent, the insured should receive the income and have the premiums waived as provided in his policy, from the time such fact is determined until the insured recovered or died. No other reasonable construction can be given the provisions of the policy in this case, and we are unable to see how any other contention could be raised, and how the appellant company could have had any intention other than to pay the income other than the fact that if at any other period the insured became totally and permanently disabled as defined in the terms of the contract that he should receive pay for the time that he was so totally and permanently disabled. If that was not the intention, why was it put in the policy as a part of the contract of insurance that the company could at any time have the insured examined to ascertain whether or not he was disabled totally and permanently from engaging in any gainful occupation?"

In discussing a like provision in an insurance contract in Prudential Ins. Co. of America v. Zorger, 86 Fed. (2d) 446, it was said at p. 447:

"The insured, however, has never been held to such a narrow and restricted meaning of the word 'permanent' when seeking benefits under a policy providing for payments when permanently disabled, but rather has been permitted recovery upon proof of a condition that would appear at the time to be reasonably certain to continue. Johnson v. Mutual Trust Life Ins. Co., 269 Ill. App. 47; Victor v. Prudential Ins. Co., 284 Ill. App. 90, 1 N. E. (2d) 441; Starnes v. U. S. (D.C.) 13 F. (2d) 212; Mut. Life Ins. Co. of N. Y. v. Wheatley, 243 Ky. 69, 47 S. W. (2d) 961. He has never been held to the duty of establishing a condition that would not under any circumstances yield to treatment and must forever remain steadfast. It would be unreasonable that he be required to exclude all possibility of improvement to entitle him to prevail."

These authorities are typical of those which construe most liberally the meaning of the word "permanent" as used in such policies. It will be noted that they hold that under a policy providing for waiver of premiums and benefit payments to the insured for total and permanent disability the word "permanent" should be interpreted to allow recovery upon proof of a condition that will be reasonably certain to continue indefinitely or that has the appearance of permanency.

But even under the most liberal interpretation possible of the language contained in plaintiff's supplemental contract, is he entitled to recover? While his major injury, an arm broken in several places, resulted in his total disability during the period heretofore mentioned, there is nothing in the nature or character of his injuries as shown by the evidence that gave them even the appearance of permanency or that indicated a condition that would continue indefinitely. Such a showing, at least, is requisite for the recovery of disability payments under the terms of the policy. Even his attending physician in his certificate attached to plaintiff's statement of claim to the defendant company in answer to the question on said certificate, "If wholly disabled at the present time [November 24, 1933] please give your opinion as to whether total disability be permanent or temporary?" answered, "Temporary." We are impelled to hold under the evidence submitted

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"Temporary." [illegible] the evidence submitted

that plaintiff's disability, while total, was temporary and not permanent as contemplated by his contract of insurance with defendant and that no recovery can be had therefor.

In the view we take of this case it is unnecessary to discuss or pass upon plaintiff's cross appeal.

For the reasons stated herein the judgment of the Municipal court of Chicago is reversed and judgment is entered here in favor of defendant and against plaintiff.

JUDGMENT REVERSED AND JUDGMENT HERE IN FAVOR OF DEFENDANT AND AGAINST PLAINTIFF.

Friend, P. J., and Burke, J., concur.

40038

CLAUDE W. B. HOLMAN,
Appellant,

vs.

INDIANAPOLIS LIFE INSURANCE CO., a corpor., and SAMUEL B. SENELICK, LOUIS SURKINS and JACK HADESON, doing business as a co-partnership,

Appellees.

76A

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO

297 I.A. 649²

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

By this appeal plaintiff, Claude W. B. Holman, seeks to reverse a judgment rendered in favor of defendants upon the verdict of a jury finding the issues against plaintiff in an action brought by the latter to recover damages for the loss of personal property belonging to him which had been stolen during his absence from a room occupied by him in defendants' hotel. The suit, originally instituted against others in addition to the present defendants, was dismissed as to all except Samuel B. Senelick, Louis Surkins and Jack Hadeson, copartners, operating the Brookmont Hotel.

Plaintiff's statement of claim alleged substantially that defendants operated an inn known as the Brookmont Hotel at 3953 South Michigan avenue; that on and prior to October 1, 1936, he was a traveler and as such was received into said inn as a paying guest by the said defendants, together with his goods, chattels and personal effects; that it was defendants' duty to "keep said goods, chattels and personal effects of the plaintiff in a safe and secure condition;" that, notwithstanding their duty, defendants negligently allowed and permitted his belongings to be taken from his room; and that at all times he exercised due care and caution for the safety of said belongings.

Defendants' affidavit of defense admitted that they were innkeepers, denied that plaintiff was a traveler, stated that his belongings were kept safely and securely and denied that plaintiff acted with due care and caution for the safety of his goods and property.

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v.

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LOUIS [illegible]
doing business as a [illegible] ship,

[illegible]pellees.

MR. JU[illegible]

By this [illegible] reverse a judgment rendered in favor [illegible] the verdict of a jury finding the [illegible] by the latter to recover [illegible] belonging to him which [illegible] occupied by him in [illegible] against others in addition to [illegible] to all except Samuel [illegible] partners, operating [illegible]

Plaintiff [illegible] that defendants operate[illegible] South Michigan avenue; [illegible] traveler and as such [illegible] the said defendants, [illegible] effects; that it was [illegible] and personal effect[illegible] that, not intentional[illegible] permitted his baggage [illegible] times be exercised [illegible] longings.

Defendant [illegible] innkeepers, [illegible] longings were kept [illegible] with due care and [illegible]

Plaintiff is a lawyer and has been secretary to Congressman Arthur W. Mitchell since January, 1935. He testified that he had no permanent home anywhere; that he lived at the Brookmont Hotel on and off for several years; that he was subject to leave said hotel in the City of Chicago when ordered by the Congressman to do so; that he was living at the Brookmont Hotel on October 1, 1936, having checked in there the last time about July 1, 1936; that prior to that time he lived in the City of Washington, D. C., from January, 1936, until he made a trip to Europe in May, 1936; that when he returned from Europe he disembarked at New York, stopped over in Washington, D. C. for a day or so and then came on to Chicago; that when he arrived at the Brookmont Hotel in the early part of July, 1936, he talked to the general manager thereof; that she asked him how long he intended to remain at the hotel and he told her that he did not know as his plans were indefinite; that "I said if the hotel takes care of everything I may stay until I go back to Washington;" that "I told her that was also indefinite as the Congressman would have charge of the Western Division of Colored voters for President Roosevelt and at that time they were thinking of having headquarters in New York and if he did, I would have to go to New York and for that reason my stay would be indefinite, I didn't know how long;" that "she told me everything would be all right and I would take 346 * * * that the rent was $4.00 a week;" that "I didn't say whether I would stay there a week or month or how long but I paid for the week;" that "I occupied room 346" until "after the room was burglarized;" that he paid for the room weekly, in advance; that "I left the room on the 1st of October [1936] going to work and locked the door;" that I was then working as "Office Manager for the Congressman at 139 No. Clark Street, * * * where we had the Western Division of Colored Voters for President Roosevelt;" that after he locked the room door, he left the key at the desk on the main floor of the hotel; that "I came back that day as it was pay day and got my check out of the mail but I didn't go up to the room * * * picked up my mail and left;" that he did not go to his room again on October 1, 1936 "until later that night when I went in to go to bed * * * at least 12:00 or it might have been

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later;" that "the room had been turned topsy turvy and my personal papers were all scattered about the room * * * sailed laundry was all over the floor * * * every piece of paper had been moved from the position I left it in * * * my suits and everything of value was gone;" that the door of his room was closed and locked "when I came back as when I left and the maid had not made up my bed;" that he opened the door with his key, which he had received at the desk on his way up to his room; that the windows of his room, which he had closed before leaving in the morning, were half way up from the bottom and "the screens were out and they were not out when I left;" that "I went immediately back downstairs and told Mr. Walker who was on duty at that time * * * I asked him to call the managers and the police and he said he had no authority and that the owners objected to being disturbed at night about anything that happened during the night * * * I called the police myself;" that when the police arrived they, as well as the manager, housekeeper and the bell boy who was on duty, went to his room; that the maid, whose duty it was to take care of his room, was then sent for; that while all of those mentioned were in his room, Mrs. Reed, the manager, said "the owners of the hotel would be responsible and I need not worry * * * they would take care of the loss;" and that in August, 1936, when he was leaving the hotel to make a trip to Topeka, Kansas, he stopped at the manager's desk and said "I am leaving, and asked if she would take care of my things * * * she said I will see that everything you have will be all right as long as you are with us." He further testified that the aggregate value of his clothing and other personal property taken from his room was $401.30.

It appeared that all of the doors of the rooms throughout the hotel were equipped with new Yale locks, supposedly burglar proof; that when plaintiff returned to his room that night there was nothing wrong with the lock and the door had not been "jimmied;" that there were only three keys to the door, one which the plaintiff used and left at the hotel desk when he went to work that morning, a pass-key used by the maid who took care of the room and a key that always remained at the desk. The maid who

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was assigned to take care of plaintiff's room testified that her duties began at nine in the morning; that she went to plaintiff's room about 9:30 a.m. on the morning in question; that "his trunk was open, things deranged, and I slammed the door and went out;" that she did not notice anything else unusual and "I got mad and went on out;" that her key turned the lock in the door that morning as it did later; that she entered Holman's room again that evening to leave towels and found it in the same condition that it was in the morning; that when she was in the room in the morning the window was closed but "the window was up and the screens were sitting in the window when they called me down that night;" and that she did not report to her superiors the condition of plaintiff's room as she found it both in the morning and in the evening of the day in question.

Plaintiff's contentions as stated in his brief are "that he was a guest at the inn of the defendants and that they owed him the duty of keeping his property safe at all events. However, plaintiff contended in the alternative that whatever the relationship was between him and the defendants (whether that of innkeeper and guest or lodging house keeper and lodger), defendants were at least ordinary bailees and as such were liable for plaintiff's loss unless they satisfactorily explained how it was lost and showed that they were not negligent. Plaintiff contends that no legal explanation was offered to exonerate defendants and that they are therefore liable. Moreover plaintiff contends that defendants expressly contracted to keep his property safe."

Defendants' theory is that "the plaintiff was not a guest but a boarder at the Brookmont Hotel, and that therefore, they are not liable for the loss of his property unless it is proven that they were guilty of culpable negligence."

In our opinion plaintiff's motion for judgement notwithstanding the verdict should have been allowed by the trial court since there was no evidence in the record that the relationship between defendant and plaintiff was other than that of innkeeper and guest. It has been repeatedly held that a person taking a room at an inn for an in-

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definite time with the option of leaving at any time he desires is a guest of such inn and the innkeeper is liable for any loss of property sustained by the guest in the absence of the latter's negligence. (Hancock v. Rand, 94 N. Y. 1; Bullock v. Adair, 63 Ill. App. 30; Moon v. Yarian, 147 Ill. App. 383; and Burdock v. Chicago Hotel Co., 172 Ill. App. 185.

It appears from the evidence heretofore set forth, that plaintiff's stay at defendants' hotel was indefinite and uncertain and that under his express contract with the general manager of the hotel his property would be safely cared for, regardless of how long he continued to remain at the hotel. One of the leading cases dealing with the question of whether one living at a hotel is or is not a guest is Hancock v. Rand supra, wherein General Hancock, whose wife was plaintiff there, contracted to stay at a hotel in New York "until the next following Spring or Summer, provided everything was satisfactory, and provided also he was not sooner ordered away on military duty." In that case the court said at pp. 5, 6, 7 and 9:

"The plaintiff claims to recover in this action the value of property stolen while a guest at the hotel of the defendants in the city of New York. * * *

"According to the evidence the General and family had a perfect right to leave at any time after the contract was made, and were not bound to remain for even an entire day, the moment General Hancock was dissatisfied he and his family had a right to leave the hotel, so also if ordered elsewhere he had a right to leave. It rested with him in these contingencies to do and act exactly as he pleased. It was a fluctuating agreement, depending upon his own will and caprice, and it cannot be said that the minds of the parties met as to any specific time whatever. * * * He was necessarily a transient person liable to respond to the call of his superiors at any moment and to change the locality of himself and family. * * *

"As we have already seen, the General being a soldier and liable to be called to distant and remote places by order of the government, and thus obliged to change his head-quarters, had no residence in the city of New York, and when stopping at a hotel awaiting orders, with the right to leave at any moment, he must be regarded as a transient person the same as any other traveler or passenger."

So, in this case, plaintiff was subject to the orders of his superior, Congressman Mitchell, who might call for his services in Washington or elsewhere at any time, and advised defendants' manager that his stay would be indefinite and that he might be ordered to New York.

In Bullock v. Adair, supra, passing upon the same question, the opinion of the court was as follows:

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[illegible]

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"The appellee is by occupation a concert singer.

"The appellant is the proprietor of Hotel Carlyle, 228 to 230 North Clark street, Chicago. From August 28 to September 6, 1894, she taught piano lessons to the wife of the manager - not the proprietor - of the hotel, and during that period lodged and ate in the hotel, then went south for five weeks. She returned and lodged, not ate, in the hotel, from October 10th to October 30th, and then went again. December 24th returned again, and lodged only in the house until April 1, 1895.

"On the night of March 6, 1895, her cloak was stolen. She sued the appellant and recovered $60. The only question in the case is, was she a guest at an inn?

"She rented a room for her own occupation at $1.50 per week, and kept it more than three months. But she was by occupation transient, not permanent. In all respects affecting the question of guest or lodger, her case is more satisfactory that she retained the former character than was that of Mrs. Gen. Hancock, in Hancock v. Rand, 94 N. Y. 1. Gen. Hancock had engaged the lodgings in that Hotel St. Cloud for a fixed term, subject to contingencies.

"The appellee did not engage for any term.

"Cards of the Hotel Carlyle in the record, not abstracted, and therefore not to be looked at if they favored the appellant, show that it was a European hotel of one hundred rooms, with first-class Vienna cafe attached, and by 'rules and regulations' claiming the benefit of 'an act for the protection of innkeepers,' approved February 21, 1861. A European hotel may be an inn.

"As a hotel it might at the same time have guests of an inn and inmates who were not guests, within its walls. A great mass of authority is collected under the title 'inns and inn keepers,' Am. & Eng. Ency. of Law, Vol. 11, to which we refer without collating."

In Moon v. Yarian et al, supra, in passing upon the the question under consideration, the court said at pp. 385 and 386:

"He [plaintiff] arrived at Hotel Dearborn in August, 1906, and in November following his baggage was taken from his room during his absence at his work. On leaving for his work in the morning he locked the door of his room and left the key with the hotel clerk.

"It clearly, we think, appears that plaintiff was a transient guest at defendant's hotel. He had traveled much in this country, going from place to place, as far West as California, reaching Chicago in August, 1906. There is no evidence that he was permanently resident here or had any intention of so becoming. He made no arrangement looking to a permanent stay in Chicago with his landlords or any one else. From aught that appears to the contrary his employment whatever it may have been, was as transient as his stay at the hotel. He was essentially a traveler within both the British and American interpretation, and a guest of the Hotel Dearborn, the landlords of which owed him the duty of an innkeeper to protect from harm his person and baggage, and a failure to do so and to extend such protection subjected the landlords to the liability which the law imposes upon innkeepers. They must compensate for the loss to their guest, occasioned by the non-fulfillment of the duty imposed upon them by law. A 'wayfaring man' ceases to be a guest only when he takes up a permanent abode at an inn. He then becomes a boarder and loses his standing as guest. Horner v. Harvey, 3 Gild. 307.

"Plaintiff had no contract with his landlords indicative of permanency of residence. He was unhampered by any contract obligation from departing at his pleasure and resuming his travels at his will.

"Hancock v. Rand, 94 N. Y. 1, is most frequently cited in this class of cases. Gen. Hancock intended to continue at the [illegible] with his wife for a definite time unless military duty required

his presence elsewhere. Notwithstanding this itention as to fixity of time, he was still a guest, for New York was not his permanent home, and the court on disposing of this point, say: 'The length of time a man is at an inn makes no difference, whether he stays a week or a month or longer; so, although he is not strictly transient, he retains his character as traveler.'

"Moon, the Korean, may go his way to his native isle or elsewhere in the world, whenever the spirit of travel shall again possess him, for so far he has given no evidence of making his stay in Chicago permanent.

"Bullock v. Adair, 63 Ill. App. 30, is decisive on fact and law of this case; and the late Judge Gary, speaking for the court said: 'In all respects affecting the question of guest or lodger her case is more satisfactory that she retained the former character than that of Mrs. Gen. Hancock in Hancock v. Rand. * * * Gen. Hancock had engaged the lodgings in the Hotel St. Cloud for a fixed term, subject to contingencies. The appellee did not engage for any term.'"

In Burdock v. Chicago Hotel Co., supra, it was stated at pp. 186 and 187:

"The principal question before us is whether the defendant assumed the obligation of an innkeeper or that of a lodging house keeper. The court charged the jury that it was a question of fact for them to determine whether the relationship between the plaintiff and the defendant was that of a transient guest at a hotel or whether it was that of a boarder or lodger at a boarding house or a lodging house. Defendant asked an instruction to the effect that the relationship between them was that of a lodger and lodging house keeper, and that the defendant was under no duty to care in any way for the safety of the goods or property of the plaintiff, which instruction was refused.

"The only evidence in the record as to the contract made is that of the plaintiff. She testifies that while she paid by the week after being transferred to the second room, nothing was at any time said as to the length of time which she would occupy the same. She further testified that her home was in Iowa, and that although she was in Chicago a large part of the time her business required her to travel more or less; that she was employed by two life insurance companies, being assistant treasurer of one of them. She was given a key to the room in the usual way, and whenever she left the hotel left the key with the clerk. The Palmer House has between five and six hundred rooms, nearly all of which are used by transient guests, a few being occupied by people who might not be considered as "transient.'

"The contract made between the parties would seem to be no different than that made ordinarily by an innkeeper with a guest, unless it be found in the fact that the rate was made by the week instead of by the day. We think the plaintiff would be entitled to expect that her treatment would be exactly the same as that of any transients at the hotel. The rate was given for the room alone, and did not include meals. We think the court would have been justified in charging the duty to this effect, instead of leaving it to them to determine what the contract was as a question of fact. Clearly the defendant would be entitled by rules and regulations to claim the benefit of the act for the protection of innkeepers, and doubtless does so. The following cases are in point. Bullock v. Adair, 63 Ill. App. 30; Moon v. Yarian, 147 Ill. App. 383, and Hancock v. Rand, 94 N. Y. 1."

Plaintiff's uncontraverted testimony that he did not have a permanent home anywhere and that he advised the general manager of defendants' hotel when he checked in same about July 1,

his presence [illegible]
time, he was [illegible]
and the court [illegible]
man is at [illegible]
month or for [illegible]
his character as [illegible]

"[illegible]
or elsewhere in the [illegible]
possess him, for [illegible]
in Chicago permanently.

"[illegible]
fact and law of the [illegible]
court said: '[illegible]
lodger nor one in [illegible]
character than the [illegible]
gen. Hancock has [illegible]
fixed term, [illegible]
any term.'"

---

stated at pp. [illegible]

"[illegible]
ant assumed the obligation [illegible]
keeper. The [illegible]
them to determine [illegible]
the defendant [illegible]
was that of a boarding [illegible]
house. Defendant [illegible]
ship between the [illegible]
that the defendant [illegible]
of the goods [illegible]
fused.

"[illegible]
made in the [illegible]
the week after [illegible]
any time said [illegible]
she further testified [illegible]
she was in Chicago [illegible]
to travel more or [illegible]
companies, being [illegible]
key to the room in [illegible]
the key with the [illegible]
hundred room-[illegible]
few being occupied [illegible]
ment.'

"[illegible]
be no different [illegible]
week, unless [illegible]
week instead of [illegible]
to expect that [illegible]
tenants at [illegible]
did not [illegible]
in charging [illegible]
determine [illegible]
defendant could [illegible]
benefit of the [illegible]
does so. The [illegible]
[illegible]
[illegible]

not have [illegible]
manager of [illegible]

1936, that his stay would be indefinite, clearly fixed his status as that of a guest and imposed upon defendants the liability of an innkeeper under the principles and rules enunciated in the foregoing authorities. Furthermore, plaintiff's testimony that defendants' general manager expressly agreed to keep his property safely and securely was not denied, although said manager was a witness upon the trial of this cause.

Defendants' brought out the fact on the cross-examination of plaintiff that the latter registered from the Brookmont Hotel as a qualified voter for the November, 1936, election. This was for the purpose of attempting to establish his status as a permanent resident and lodger in the hotel rather than as a guest therein. Since his status as guest was clearly established by the contract between the parties the fact of his registration was immaterial and could not be legally effective to change such status. Under a similar factual situation in the Burdock case, supra, it was stated that the trial court would have been justified in charging the jury that the relationship of guest and innkeeper existed between the parties instead of leaving it to the jury to determine what the contract was as a question of fact. So in this case the relationship of the parties having been clearly shown by the uncontradicted evidence of plaintiff to be that of guest and innkeeper, defendant is liable for the loss of plaintiff's property of the undisputed value of $401.50, by theft from his room or otherwise, and plaintiff's motion for judgment notwithstanding the verdict for that amount should have been allowed.

Other points have been urged and considered but in the view we take of this case it is unnecessary to discuss them.

For the reasons stated herein the judgment of the Municipal court is reversed and the cause remanded with directions to enter judgment for $401.50, in favor of plaintiff and against defendant, notwithstanding the verdict of the jury.

REVERSED AND REMANDED
WITH DIRECTIONS.

Friend, P. J., and Burke, J., concur.

1956, th [illegible]
of a guest and [illegible]
under the [illegible]
Furthermore, [illegible]
precisely agreed [illegible]
although [illegible]

[illegible]

tion of plaintiff [illegible]
a qualified voter [illegible], 1956
purpose of [illegible]
and lodger in the [illegible]
as guest was clearly [illegible]
fact of his residence [illegible]
to change such status. [illegible]
case, supra, it [illegible]
in charging the [illegible]
ed between the [illegible]
what the contract [illegible]
jationship of [illegible]
ed evidence of [illegible]
liable for the loss of [illegible]
§401.80, by [illegible]
for judgment not [illegible]
been allowed.

[illegible]
view we take of the [illegible]

[illegible]
appeal court [illegible]
judgment for [illegible]
withstanding the [illegible]

Friend, P. J., and Burke, J., concur.

40058

CRITTALL MANUFACTURING COMPANY, Inc., a corporation,
Appellee,

v.

JACOBSON BROTHERS COMPANY, a corporation,
Appellant.

APPEAL FROM THE MUNICIPAL COURT OF CHICAGO.

297 I.A. 649

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This is an action to recover a balance of $2,303 alleged to be due plaintiff, Crittall Manufacturing Co., from defendant, Jacobson Brothers Company.

Plaintiff's statement of claim alleged in substance that on December 28, 1935, it entered into a written agreement with defendant, which had the principal contract for the erection of the Administration Building of the University of Indiana at Bloomington, Indiana, whereby it agreed to furnish "all steel casement windows and metal stools, erected in place complete, and to furnish bronze wire insect screens" for said building for $12,093; that it performed the work and labor and furnished the materials required by said contract; and that defendant paid plaintiff $8,575 and is entitled to a credit of $1,214, leaving a balance due of $2,303.

Defendant admitted in its affidavit of merits that it entered into a written contract with plaintiff, as alleged in the latter's statement of claim, denied "that plaintiff performed the work and labor to be performed under said contract and denied that plaintiff fulfilled all the duties which devolved upon it under the terms thereof." It then alleged that plaintiff

"unreasonably delayed delivery and erection in place complete of the steel casement windows and metal stools agreed to be furnished and erected complete by said plaintiff beyond the time agreed upon for such delivery and erection and in violation of said contract;" and that "by reason of the said delay by said plaintiff in performing or tendering performance of the said contract the defendant necessarily incurred certain expenses and damages which have been properly charged to the plaintiff under the terms of said contract. It was then denied that "there is due the plaintiff from defendant the sum of $2,303 or any other sum except the sum of $478.96, which plaintiff is now and has been at all times ready, willing and able to pay the plaintiff." Attached to its affidavit of merits as "Exhibit A" was defendant's statement of account between the parties. Judgment was entered and satisfied for $478.96, which amount the defendant admitted to be due from it to plaintiff. The trial of the cause was ordered to proceed as to the balance of plaintiff's claim, defendant being ordered to file a bill of particulars as to its "Exhibit A."

"A more specific 'Exhibit A' to defendant's affidavit of defense," was then filed, which, after setting forth the contract price - $12,093, deduction for contract omissions - $1,248.29 and cash paid - $8,439.61, itemized "back charges" for freight, demurrage, long distance telephone calls, cleaning, painting, plastering, carpenter's wages, boarding up windows and overhead expenses, aggregating $506.14, incurred by reason of plaintiff's failure to complete its contract within the time specified. In addition to the above items defendant in its "Exhibit A" claimed, under date of March 25, 1937, "overhead expenses on the job incurred in waiting for archives subframes and sash" as per the following items:

"unreasonably delayed [illegible] the steel curtain wall [illegible] and erected complete by [illegible] upon for such delivery and erection [illegible]" and that "by reason of [illegible] forming or tendering [illegible] necessarily incur [illegible] properly charged to [illegible] contract. It was then [illegible] defendant the sum of [illegible] $4,748.90, which [illegible] willing and able to pay [illegible] of merits as "[illegible]" [illegible] between the parties. [illegible] $4,748.00, which [illegible] plaintiff. The [illegible] the balance of [illegible] a bill of particulars [illegible] Exhibit ..."

"A more specific [illegible] defense," we also find [illegible] price - $12,000, [illegible] cash paid - $[illegible], [illegible] demurrage, [illegible] plastering, carpenter [illegible] expense, [illegible] failure to [illegible] addition to the [illegible] under date of [illegible] curred in [illegible] following item:

Superintendent, 1-1/2 months	$ 480
Asst. Sup. 1-1/2 months	324
Clerk, 1-1/2 months	300
3 Watchmen, 1-1/2 months	316
Total	$1,420

Thereafter, on October 26, 1937, plaintiff filed a written motion for "a partial judgment in favor of the plaintiff herein and against the defendant herein for the sum of $1,420 and interest thereon from March 31st, 1937, for the following reasons:

"(1) Section 3 of the contract dated December 28th, 1935, referred to in paragraph 2 of the plaintiff's statement of claim reads as follows:

"'As required by the progress of the job and so as not to delay contractor. Contractor will furnish Sub-Contractor a progress schedule and if Sub-Contractor refuses or fails to prosecute the work with much [such] diligence as will insure its completion according to said schedule, the Contractor may terminate this contract and take over the work and prosecute same to completion by contract or otherwise and the Sub-Contractor shall be liable to the Contractor for any excess cost occasioned the Contractor thereby. If Sub-Contractor's right to proceed is so terminated, the contractor may take possession of and utilize in completing the work such material, appliances and plant as may be on the site of the work and necessary therefor.'

"(2) The back charge of $1,420 shown on page 3 of the more specific Exhibit A to defendant's affidavit of defense under items dated March 25, 1937, is too speculative and remote and not in contemplation of the parties in view of the aforesaid written agreement and therefore not recoverable by the defendant as an element of damage in recoupment, set-off or counterclaim."

November 19, 1937, defendant filed an additional affidavit of merits and counterclaim. In its affidavit of merits it admitted that it entered into a contract with plaintiff on December 28, 1935,

[illegible]

[illegible]

Therefore, [illegible] motion for "[illegible] against the defendant [illegible] thereon from March [illegible]

"(1) [illegible] referred to in [illegible] reads as follows:

"[illegible] delay contractor, [illegible] schedule and [illegible] work with such [illegible] according to such [illegible] tract and take over [illegible] contract or other [illegible] Contractor for any [illegible] or thereby. If Sub-contractor [illegible] may take possession of [illegible] such material, supplies [illegible] may be in the [illegible] and necessary therefor."

"(2) The [illegible] specific [illegible] dated March 20, 1[illegible] contemplation of [illegible] mens and therefore [illegible] of damage in [illegible]

[illegible]

[illegible]

what it answers in [illegible]

wherein the latter agreed to furnish and install steel casement windows, etc., for the Administration Building of the University of Indiana for $12,093, denied that plaintiff performed the work and fulfilled the duties which devovled upon it under the terms of the contract, admitted that it paid plaintiff certain sums of money, averred that it is entitled to certain credits, which, with the amounts paid, aggregate the contract price, and denied that there is any sum due plaintiff.

The allegations of defendant's counterclaim pertinent to this appeal, as set forth in the abstract, are as follows:

"*** defendant, Jacobson Brothers Company, entered into an agreement wherein plaintiff agreed to furnish steel casement windows, metal stools, erected in place, and to furnish subframes and bronze wire insect screens delivered to job site, and to submit necessary drawings for approval at a contract price - $12,093.

"*** parties agreed that General Contract, Specifications, etc., between owner and Jacobson Brothers Company shall be binding on plaintiff.

"Plaintiff agreed to complete said work as follows:

"Section 3. The subcontractor agrees to complete the several portions and the whole of the work herein sublet by the time or times following: As required by the progress of the job and so as to not delay Contractor. Contractor will furnish Sub-Contractor a progress schedule and if Sub-Contractor refuses or fails to prosecute the work with such diligence as will insure its completion according to said schedule, the Contractor may terminate this contract and take over the work and prosecute same to completion by contract or otherwise and the Sub-Contractor shall be liable to the Contractor for any excess cost occasioned the Contractor thereby. If Sub-Contractor's right to proceed is so terminated, the contractor may take possession of and utilize in completing the work such material, appliances and plant as may be on the site of the work and necessary therefor.

"In accordance with contract, defendant delivered progress schedule directing plaintiff to complete work between period from March 1, 1936, to June 15, 1936. Plaintiff accepted progress schedule and agreed to be bound thereby.

"The contract provision as to damages is as follows:

"'If either party to this Contract should suffer damage in any manner because of any wrongful act or neglect of the other party or of anyone employed by him, then he shall be reimbursed by the other party for such damage.

"'Claims under this clause shall be made in writing to the party liable within a reasonable time of the first observance of

wherein the [illegible]

windows, etc., [illegible]

of [illegible] for [illegible]

and fulfilled [illegible]

of the contract, [illegible]

money, [illegible]

the amounts [illegible]

there is any [illegible]

The [illegible]

this appeal, [illegible]

"[illegible] an agreement [illegible] windows, [illegible] and brooms also [illegible] submit [illegible]

"[illegible] etc., [illegible] on plaintiff.

"Findings [illegible]

"Section [illegible] several portions [illegible] time or times [illegible] and so is to [illegible] Contractor [illegible] fails to proceed [illegible] its completion [illegible] terminate [illegible] to completion by [illegible] be liable to the [illegible] Contractor [illegible] terminated, [illegible] completing the work [illegible] on the [illegible]

"[illegible] schedule directly [illegible] through [illegible] schedule and [illegible]

"The [illegible] follows:

"If [illegible] in any [illegible] party or of [illegible] by the other [illegible]

"[illegible] party liable [illegible]

such damage and not later than the time of final payment, except as expressly stipulated otherwise in the case of faulty work or materials and shall be adjusted by agreement of arbitration.'

"Without defendant's fault plaintiff refused to comply with terms of the contract by failing to deliver and install materials in accordance with the terms of the contract and in accordance with time limit set in progress schedule. Plaintiff agreed to be bound by general contract in which defendant agreed to finish building in 300 days which ended October 12, 1936, date known to plaintiff. Plaintiff ignored and disregarded progress schedule, failed and refused to deliver materials, notwithstanding repeated requests and demands, until after December 15, 1936, and by reason of plaintiff's default, defendant was delayed in completion until January 15, 1937, and by reason thereof, defendant incurred expenses in protecting and preserving property, keeping available workmen and employees, and in supervision of subcontractors, who, because of plaintiff's default were unable to complete work until plaintiff's materials were furnished and work completed. That by reason of plaintiff's breach and neglect, defendant incurred overhead expenses during the period of said delay in completion of job, and said overhead expenses necessarily incurred and claimed as damages from plaintiff are:

Superintendent, from 11-1-36 to 12-15-36.....	$ 480.00
Job foreman from 11-1-36 to 12-15-36.....	324.00
Clerk, from 11-1-36 to 12-15-36.....	300.00
3 Watchmen from 11-1-36 to 12-15-36.....	316.00
Long distance calls.....	48.78
Labor and materials in closing windows.....	137.50
Total.....	$1,606.28

"Because of breaches of contract by plaintiff, defendant incurred additional expense and damage in and about preserving property from elements, etc.

Carpenter, plasterer and laborer.....	$ 8.16
Cleaning tile floor.....	9.68
Painter.....	10.77
Paint and painter.....	27.81
Plaster patching.....	108.20
Freight and demurrage.....	135.59
Cost of Burning edges of subframes.....	19.65
	$319.86

"Claim for damages made to plaintiff in writing as provided by contract."

The following draft order was entered on December 9, 1937:

"This matter coming on to be heard on the motion of Crittall Manufacturing Co. *** plaintiff herein, *** for the entry of a partial judgment in favor of the plaintiff herein, and against the defendant herein, for the sum of $1,420.00, and interest thereon from March 31st, 1937, and the court having heard the arguments of Counsel, and being fully advised in the premises, and on consideration thereof, sustains the said Motion in part and does hereby order and adjudge that the items of recoupment stated in the defendant's affidavit of merits and additional affidavit of merits and counter claim filed in the above entitled cause on November 19th, 1937, on page 6 thereof, namely:

"'Superintendent, from 11-1-36 to 12-15-36 at $320.00 per month.....$ 480.00
'Job Foreman from 11-1-36 to 12-15-36 at $216.00 per month..... 324.00
'Clerk from 11-1-36 to 12-15-36 at $200.00 per month..... 300.00
$1,104.00

be and said items are hereby stricken, and does further order and adjudge that a partial judgment in the sum of $1,104.00 be entered in favor of Crittal Mfg. Co., Inc., a corporation, plaintiff herein, and against Jacobson Brothers Company, a corporation, defendant herein; that execution may issue on said partial judgment, and that the above entitled cause be set for trial with respect to the balance involved in the above entitled cause of action."

It is from this judgment order that defendant appeals, contending that the remedy provided by sec. 3 of the contract between the parties, heretofore set forth, was not exclusive but that it was optional; that it might permit plaintiff to complete the work and recover for the damages caused by its delay by way of reduction of the contract price; that the items of damage it seeks to recoup are not speculative or remote but are proper elements of damage, upon which it is entitled to a trial on the merits.

Plaintiff's theory, as stated in its brief, is that "in order to claim special damages it was the duty of defendant to set them forth with great particularity, especially so in view of the fact that the court ordered it to file a Bill of Particulars; that the defendant should have in its Bill of Particulars or Additional Affidavit of Merits and Counterclaim shown the causal relation between the alleged delay and the employment of a superintendent, foreman and clerk during the period that the work was held in abeyance; that the general allegations of this damage in the Affidavit of Merits and Counterclaim is not specific enough to show that the employment of such workmen during the time that there was no construction work being performed was directly necessitated by the alleged delay of the plaintiff. The plaintiff further contends that before the defendant can claim any damage the defendant must allege that he [it] has used every reasonable effort to minimize

[illegible]

[illegible] per month.....

[illegible]

[illegible] defendant [illegible] con-
tendin[illegible] [illegible] been
the petition, [illegible]
was quitclaim[illegible]
and recover [illegible]
of the [illegible]
are not sound [illegible]
upon which [illegible]

[illegible]
order to claim [illegible]
them form [illegible]
fact that the [illegible]
the defendant should [illegible] in [illegible]
affidavit of [illegible]
between the [illegible]
foreman and clerk [illegible]
ance; that the [illegible]
of Merlie and [illegible]
employment of [illegible]
attention [illegible]
alleged [illegible]
that before the [illegible]
allege that he [illegible]

the damage accruing to him [it] as a result of such breach."

It will be noted that, although defendant enumerated many items in its counterclaim which it claimed it should be allowed by way of setoff or recoupment against plaintiff's claim because of the latter's delay in performing its obligations under the contract, plaintiff has seen fit to question only the items of salaries for a month and one half of the superintendent, job foreman, clerk and three watchmen, as expenses not properly recoverable by defendant. It will also be noted that in the judgment appealed from, the trial court disallowed plaintiff's motion as to the salaries paid defendant's three watchmen, holding in effect that the payment of the salaries of the watchmen might be proper matter for recoupment. The controversy here is therefore concerned only with the items of defendant's superintendent's salary of $480 for the period from November 1, 1936, to December 15, 1936, its job foreman's salary of $324 and its clerk's salary of $300 for the same period, the payment of which salaries aggregating $1,104, defendant alleges and insists was necessitated by plaintiff's delay in furnishing the materials and performing the work required of it under the contract. It was these items, claimed among others by way of recoupment in defendant's counterclaim, which were stricken from said counterclaim and for the total amount of which the additional partial judgment for $1,104 was entered.

Plaintiff's theory in the trial court as set forth in its motion for the partial judgment was entirely different from the theory advanced by it here to sustain the judgment appealed from. In the trial court plaintiff insisted that defendant's exclusive remedy under the contract for the former's alleged delay in performance was to terminate said contract, take over the work and prosecute same to completion, the subcontractor being then liable

the damage [illegible]

It will be noted [illegible] items in the counterclaim which [illegible] by way of setoff or [illegible] of the Industrial [illegible] tract, [illegible] for a month and [illegible] and three weeks [illegible] ant. It will [illegible] trial court [illegible] defend [illegible] the [illegible] of the [illegible] The contention [illegible] of defend [illegible] November 1, [illegible] of 1924 and the [illegible] payment of which [illegible] and insists [illegible] the material [illegible] contract. [illegible] recognment in defendants counterclaim [illegible] said counterclaim [illegible] partial judgment [illegible]

Plaintiff's [illegible] motion for the partial judgment [illegible] theory advanced [illegible] In the trial court [illegible] remedy under [illegible] formance [illegible] prosecute [illegible] proceeds [illegible] when liable

to the contractor for any excess cost occasioned the latter thereby; and that the "back charge" of the expense of the salaries of the superintendent, job foreman, clerk and watchmen is "too speculative and remote and not in contemplation of the parties in view of the aforesaid agreement and, therefore, not recoverable by the defendant as an element of damage in recoupment, set-off or counterclaim." Plaintiff has apparently abandoned these contentions for no mention of them is made in its brief filed in this court. Of necessity they had to be abandoned since the contract also contained the following provision:

> "If either party to this Contract should suffer damage in any manner because of any wrongful act or neglect of the other party or of anyone employed by him, then he shall be reimbursed by the other party for such damage."

Defendant clearly had an election of remedies for any damages suffered by it by reason of plaintiff's default. Under the provision of the contract just quoted defendant was entitled to be reimbursed by way of recoupment or set-off for any proper elements of damage. Plaintiff argues in its brief that "the additional affidavit of merits and counterclaim of the defendant does not definitely show that the three items of damage in question are necessary expenditures resulting from the alleged delay of the plaintiff in its performance of the contract." It is sufficient answer to this contention that plaintiff's default was specifically set forth and defendant's damages are alleged with particularity in its additional affidavit of merits and counter claim as resulting directly from said default. Plaintiff insists that the damages claimed by the defendant are special and, therefore, should be set forth with great particularity. They are so alleged. The reason for the rule that special damage should be set forth with particularity in the pleadings is to prevent a surprise upon the opposite party to the proceeding. (Meyer & Sons v. Davies, 17 Ill. App. 228.) Plaintiff should certainly be no more surprised when

to the court [illegible]

by; and that the [illegible]

the superintendent, [illegible]

speculative and remote [illegible]

in view of the [illegible]

by the defendant [illegible]

counterclaim." [illegible]

tions for no [illegible]

court. [illegible]

also contained the following provision:

"If either party to [illegible] in any manner [illegible] party or of [illegible] by the other party [illegible]

Defendants also [illegible]

damages suffered by [illegible]

the provision of the [illegible]

to be reimbursed [illegible]

elements of damage. [illegible]

ditional affidavits [illegible]

not definitely show [illegible]

necessary expenditure [illegible]

plaintiff in [illegible]

answer to this [illegible]

not form and [illegible]

in its additional [illegible]

circuity from [illegible]

claimed by the [illegible]

for a [illegible]

for the [illegible]

tionately in [illegible]

opposite party to [illegible]

pp. 220.) Plaintiff [illegible]

defendant attempts to prove on the trial of this cause on its merits damages by way of recoupment for wages of a superintendent, job foreman and clerk than when it attempts to prove damages as to the other items alleged, including salaries of watchmen and money expended for long distance telephone calls, labor and materials and wages for carpenters and painters. It must be conceded that if plaintiff's default in the performance of the contract is sufficiently shown, defendant is entitled to prove, if it can, that the elements of damage set forth in its counterclaim were the natural and necessary consequence of said default.

For the reasons stated herein we are impelled to hold that the trial court acted erroneously in striking from defendant's counterclaim the three items concerning wages paid to its superintendent, job foreman and clerk, and in entering a partial judgment in favor of plaintiff and against defendant for $1,104, the aggregate amount of such items.

The judgment of the Municipal court is reversed and the cause remanded for a trial on its merits.

JUDGMENT REVERSED AND CAUSE REMANDED.

Friend, P. J., and Burke, J., concur.

defendant [illegible]

merit: damages [illegible]

job foreman [illegible]

the other items [illegible]

expended for [illegible]

and work for [illegible]

if plaintiff [illegible]

sufficiently [illegible]

that the element [illegible]

the natural [illegible]

[illegible]

that the oral [illegible]

and's counterclaim [illegible]

superintendent, [illegible]

judgment in [illegible]

the [illegible]

[illegible]

the cause [illegible]

[illegible]

Friend, [illegible]

9316

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 3rd day of May, in the year of our Lord one thousand nine hundred and thirty-eight, within and for the Second District of the State of Illinois:

Present -- The Hon. FRANKLIN R. DOVE, Presiding Justice
Hon. FRED G. WOLFE, Justice
Hon. BLAINE HUFFMAN, Justice
JUSTUS L. JOHNSON, Clerk
RALPH H. DESPER, Sheriff

297 I.A. 649

BE IT REMEMBERED, that afterwards, to-wit: On SEP 15 1938 the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:

Gen. No. 9318 Agenda No. 16

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

May Term, A.D. 1938

Elmer E. Nystrom,

Plaintiff-Appellee

vs.

Chicago St. Louis Transfer Company, a Corp.,

Defendant-Appellant

Appeal from the Circuit Court of Peoria County.

WOLFE, J.

This suit is brought by Elmer E. Nystrom against the Chicago-St.Louis Transfer Company to recover damages for personal injuries sustained by the plaintiff on April 25, 1937, as a result of the collision of the automobile of the plaintiff with the motor vehicle of the defendant on State Highway No. 66, about two miles south of the village of Elkhart. The vehicle of the defendant at the time was a tractor pulling a trailer loaded with freight, and it will be designated herein as a truck. About six o'clock p.m. on that day while the truck was being driven northward up an incline, one of the pistons of the motor broke, the engine was completely disabled and the truck stopped at the crest of the elevation. The truck driver rode to Elkhart in the car of acquaintances who were driving toward the village and who had stopped near the stalled truck. The truck driver went to Elkhart to report the condition of the motor to his employer. He returned to the truck at about 7:00 o'clock p.m. that evening. The truck was standing in the east lane of travel at 7:30 p.m. at the top of the hill when the plaintiff driving his automobile toward Elkhart collided with the rear of the truck and sustained the injuries complained of.

The complaint charges general negligence in the operation of the truck in allowing it to stop in the easterly half of the highway; a lack of reasonable care to give proper warning of the presence of

Gen. No. [illegible]

[illegible]

Elmer E. [illegible]

[illegible]

vs.

Chicago [illegible]
Company, a [illegible]

[illegible]

WOLFE, J.

This suit is [illegible]
St.Louis Terminal [illegible]
awarded by a [illegible]
collision [illegible]
of the defendant [illegible]
the village of [illegible]
was a tractor [illegible]
designated [illegible]
while he was [illegible]
pleasure of [illegible]
the trucks [illegible]
road to [illegible]
the village [illegible]
driver went [illegible]
employer. [illegible]
evening. [illegible]
[illegible] of the [illegible]
towards [illegible]
injuries complained of.

[illegible]
drunk in [illegible]
[illegible]

the truck stopped on the highway; negligent failure to keep a proper lookout for other persons using the highway; negligent failure as provided by the Motor Vehicle Law to place burning flares on the highway when a commercial vehicle is stopped on said highway; and negligent failure to display a light at the rear of a parked truck as required by said act. The complaint alleges due care on the part of the plaintiff before and at the time of the collision. Ad damnun clause, $25,000.00.

The answer admits ownership of the truck and agency of the driver; denies charges of actionable negligence and alleges flares were placed on the highway before the accident as required by the Motor Vehicle Law; further alleges the injury to the plaintiff, if any, was occasioned by the contributory negligence and want of care and caution by the plaintiff at and immediately prior to the time of the accident. The trial was by jury and the defendant made the usual motions at the close of the plaintiff's evidence and at the close of all of the evidence for a directed verdict, which motions were overruled. There is a verdict and judgment for the plaintiff for $10,000.00. A motion for a new trial was denied and defendant has appealed to this court.

It is urged that the plaintiff was guilty of contributory negligence, as a matter of law, as shown by the testimony of the plaintiff; that the trial court should have directed a verdict for the defendant on the ground that the plaintiff failed to prove actionable negligence on the part of the defendant. These contentions require a consideration of the testimony of the plaintiff together with the other evidence introduced by him, in the first instance, at the trial.

The plaintiff testified substantially as follows: He is a physician and surgeon, 53 years of age. He has practiced his profession in Illinois since 1909, and resides in Peoria; that on Sunday, April 25, 1937, accompanied by his wife who sat in the front seat beside him, he was driving his DeSoto automobile from Alton to

[illegible]
look [illegible]
provide [illegible]
way [illegible]
sent [illegible]
required [illegible]
the pl[illegible]
clause, [illegible]

[illegible]
driver [illegible]
were pl[illegible]
motor [illegible]
any, [illegible]
and o[illegible]
the sc[illegible]
motions [illegible]
all of [illegible]
rule. [illegible]
no, [illegible]
appealed to [illegible]

It is [illegible]
negli[illegible]
plaintiff; [illegible]
the [illegible]
solicit[illegible]
tenders [illegible]
together [illegible]
instance, [illegible]

[illegible]
physicia[illegible]
professor [illegible]
[illegible], legal [illegible]
[illegible]

Peoria by way of Route No. 66; that his automobile was in good condition and that the brakes had been recently tested before that time; that the tires on the car were new; that he had been in St. louis, Mo., on that day and had been driving his car most of the day; that there was a drizzle during most of the day; that at Springfield he stopped for gasoline and the windshield wiper on his car was cleaned; that after leaving Springfield he proceeded northward on Route No. 66 toward Elkhart; that Route 66 is paved with concrete eighteen feet wide between Springfield and Elkhart; and has a black line marking the middle of the pavement and indicating two traffic lanes; that the place where the collision occurred (to the best of plaintiff's recollection) has a slight curve toward the right as one travels northward; that at the point of the accident, or just before, there is an up-grade in the highway, just a gentle ascent for probably an eighth of a mile; that the Alton railroad is immediately east of the highway and where the accident happened there is a cut so that the railroad is lower than the highway; that at the time it was intensely dark and the pavement was wet; that it had been raining off and on and the windshield of the car had moisture on it.

Plaintiff testified further as follows: "At the beginning of the curve I was traveling about twenty-five miles an hour on the right-hand side of the black line. As I continued toward the point of the accident from the beginning of the grade, I observed a light, a flare resting on the dirt shoulder about a yard east from the edge of the pavement. There were three lights setting in a row, one red and two white, grouped right close together. There were no lights on the pavement and no other lights than the group of lights. As I approached this group of lights, I began to slow up. I took my foot off the accelerator and sort of coasted along easily as I approached those lights and passed them. The speed was diminished all the time until all at once I was confronted with another--I saw an object, a large object, in front of me on the pavement, right in front of me on the right-hand side between the black line and the edge of the pavement

Peoria [illegible]
condition [illegible]
that; but [illegible]
Iowa. [illegible]
that there [illegible]
be stopped [illegible]
cleaned; the [illegible]
Route No. 30 [illegible]
ten feet wide across [illegible]
marking the [illegible]
that the [illegible]
recollection) [illegible]
northward; [illegible]
an up-grade [illegible]
of a mile; [illegible]
and where the [illegible]
is lower than [illegible]
the pavement [illegible]
windshield of [illegible]

Finally [illegible]
the curve I was travelling [illegible]
band of [illegible]
accidents [illegible]
resting on [illegible]
pavement. [illegible]
white, grouped [illegible]
pavement and [illegible]
this group of [illegible]
accelerator [illegible]
lights and [illegible]
all at once I was [illegible]
object, in front [illegible]
right-hand side [illegible]

on the right-hand lane immediately in front of me. I immediately made an endeavor to stop to try to prevent hitting it. I applied the brakes and turned the wheel to the left and then struck the truck. There were no lights on the rear of the truck at the time of the accident. The group of lights on the shoulder were about 75 or 100 feet south of the truck. My car immediately stopped right against the rear end of the truck. Most of the hood of my car was under the left rear of the truck. The first thing I observed was pain in my right knee, so severe that I momentarily was sick and faint. I later ascertained that I had sustained a fracture of the knee cap--the patella. I was unable to get out of the car immediately after the collision. I sat there for a while, several minutes, rubbing my knee. As I finally got out of the car there was a flare light placed right opposite the left rear wheel of the truck. I do not know who placed it there. It was not there before the accident. This flare, or light, was the red flare I had seen on the side of the road before the accident happened. At the point of the accident there was a guard rail about six feet from the east edge of the concrete consisting of posts and plank, such as are customarily used. The shoulder was composed of dirt, practically level with the concrete."

On cross-examination the plaintiff testified in substance as follows: "I can't answer definitely as to how quick I could stop my car under the condition of the road that night going at the rate of twenty-five miles an hour. From the time I started up the hill I had met cars going in the opposite direction they had their headlights on. As I went up the hill my vision was at a point about fifty feet ahead of the car, or less, depending on my visibility. I suppose with my lights that I had on that night my visibility was probably twenty-five to thirty feet ahead of the car; that was as far as my lights would show that night. I was looking just as far ~~xxx~~ ahead as those lights would show ahead of me. As I was moving north I observed a red light and two white lights parallel with the highway and about a yard from the edge of the pavement. I was about 300 feet from the

on the [illegible]
made an [illegible]
the [illegible]
truck. [illegible]
of the [illegible]
75 or 100 [illegible]
against [illegible]
under the left [illegible]
pain in my right [illegible]
fault. [illegible]
knee caused a fall. I was [illegible]
after the collision [illegible]
bing my knee. [illegible]
light [illegible]
not know who placed it there.
This fire, or [illegible]
the road before [illegible]
there was a great [illegible]
erable consistin of [illegible]
The signal [illegible]

On [illegible]
follows: [illegible]
car under [illegible]
twenty-nine [illegible]
met over [illegible]
As I were [illegible]
of the car, [illegible]
lights that I [illegible]
five to [illegible]
could show [illegible]
lights would [illegible]
a red light [illegible]
a word from [illegible]

red light when I first saw it. I knew the light was there but I was watching the road as I was approaching. I did not continue to watch the light. I continued to watch the road, looking somewhat ahead to see where I was going. I was looking to watch the black line so I would be sure to stay on my side of the road. When I first observed the truck, I was approximately fifteen or twenty feet from it, in my best judgment. I quickly put on my brakes and turned the wheel to avoid hitting the truck. I had hydraulic brakes on my car and used the foot brakes. I did not have time to use the emergency brake."

It is contended by the defendant that, "it is contributory negligence as a matter of law to drive an automobile at night at such speed that it cannot be stopped or turned aside within the distance in which objects can be seen ahead of it." Excepting the testimony of the plaintiff that he could not state definitely how quickly he could stop his car under the condition of the road on the night of the accident while moving at the rate of twenty-five miles an hour, there is no proof in the record, either on behalf of the plaintiff or the defendant, on the question within what distance the car could have been stopped under the circumstances appearing in the evidence and being driven at the rate of twenty-five an hour. If we applied the proposition advanced by the defendant, we would state and adopt a fixed and arbitrary rule of the road which required the plaintiff, as a matter of law, bound to observe an obstruction on the highway within the area lighted by his automobile lights, and, at his peril in any event, to avoid striking the obstruction. What is sometimes designated as the "Stop within the radius of your lights" rule is in force in some states of the Union, either as a judicial construction of a statutory provision on the question of headlights of automobiles, or by judicial determination independent of statutory provision. Other courts of last resort have refused to adopt the rule when not obligated by statutory law prescribing the rule either directly or by construction. It is realized in all the decisions, so far as our reading extends, that the rule is a general one and not to be invariably

[illegible]

applied. The following cases are reported in full with annotations in 58 A.L.R. pages 1473 to 1495. Roth v. Bloomquist, (Neb.) 220 N.W. 572; Tresise v. Ashdown, 118 Ohio St. 307, 160 N.E. 898; and Morehouse v. Everett, 141 Wash. 399, 252 Pac. 157. Diederichs v. Duke, 234 Mich. 136, 207 N.W. 874. In this connection it is important to bear in mind that in some states with statutory provision in effect or intent requiring automobile headlights of such intensity that objects ahead of the car can be seen or discerned at a certain distance, the courts of those states hold, in general, that the violation of a statutory law or requirement is negligence per se. As pointed out in Miller v. Burch, 254 Ill. App. 387, such is not the law in Illinois. In the cases of Moyer v. Vaughan's Seed store, 242 Ill. App. 308, and Skamenca v. Reeser, 294 Ill. App. 216, the courts arrived at the conclusion that the rule contended for by the defendant in the case at bar should not be adopted as a general rule. Concurring with that conclusion, we are of the opinion that it cannot be said as a matter of law that the plaintiff was guilty of contributory negligence because he failed to prove that he was able to stop his car within the area lighted by the headlights on his car.

The plaintiff's wife and another witness corroborated the plaintiff's testimony that there were no lights on the pavement nor at the rear of the truck at the time of the accident, but that lights were placed on the east shoulder of the highway. Both of these witnesses testified that a light was placed on the pavement at the rear of the truck after the collision, and that the truck driver ran and placed lights on the pavement after the accident. Their testimony also corroborated the plaintiff's statement as to the speed of his car before the accident.

In this case we think it cannot reasonably be said that the plaintiff was guilty of contributory negligence as a matter of law. That is, his conduct was so violative of all rational standards of

conduct applicable to persons in like situations that all reasonable minds would conclude that he was negligent. The night was dark and misty because of the drizzle. The plaintiff was driving along a country highway where standing unlighted vehicles were not to be expected. There is evidence that there were no rear lights on the truck nor lighted flares placed on the pavement before the accident as required by statute, but that lighted flares were on the shoulder of the highway between the highway and the railroad right-of-way. There is a cut for the railroad and a guard rail about six feet from the east edge of the pavement of the highway. The plaintiff was driving his car up an incline near its top and required by law to keep his car to the right of the black line in the middle of the pavement to avoid a probable collision with cars which might be approaching him beyond the crest of the hill. The plaintiff was looking ahead; he slackened his speed when he observed the lights on the shoulder of the road; applied his brakes when he saw the truck and swerved his car in an attempt to avoid striking it. The trial court did not err in submitting to the jury the questions of the contributory negligence on the part of the plaintiff and the actionable negligence of the defendant as questions of fact appearing in evidence in this case.

It is further argued that the verdict is against the manifest weight of the evidence. To meet the evidence of the plaintiff, the defendant introduced evidence, on its theory of the case, that the truck driver before the accident, placed lighted flares, or torches, on the pavement and that lights were burning on the rear of the standing truck as required by the Motor Vehicle Law.

The truck driver testified that on the trailer there was a red light on the left rear side, and a red light on the left corner on the back over the license plate, and three red lights in a cluster, and a red light in the corner, all on the rear of the truck. He further testified, "I tried the lights at the terminal at Springfield and they were in good order. I turned the lights on right after I got out of the city limits of Springfield. There were in the truck,

conduct applicable to [illegible]
minds would [illegible]
mighty [illegible]
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truck nor [illegible]
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of the [illegible]
There is [illegible]
the east edge of [illegible]
driving his car [illegible]
keep his car [illegible]
pavement [illegible]
approaching [illegible]
ing sheet; [illegible]
shoulder of [illegible]
swerved [illegible]
did not [illegible]
negligence [illegible]
of the defendant [illegible]
It is [illegible]
weight of [illegible]
defendant [illegible]
truck driver [illegible]
on the [illegible]
ing truck [illegible]

The truck [illegible]
light on [illegible] left rear side, [illegible]
the truck over [illegible]
and a red light [illegible]
further [illegible]
and they were [illegible]
not out of the [illegible]

three pot lights, three red flags, and six thirty-minute fusees. The pot lights had wicks and were filled with about a quart of oil. At the top of the incline about a mile and a half south of Elkhart while I was driving on the right-hand side of the highway, a connecting rod broke at the piston and the truck stopped and rolled just a little. I pulled the truck to the right-hand side of the pavement as far as I could; there was a fence on that side of the highway. *** I lit two of the torches and ran thirty-five steps and set one down thirty-five steps to the rear of the trailer in the center of the right-hand lane of the pavement. Then I went back and put the other lighted torch about thirty steps ahead of the tractor. After lighting the third torch I walked around to the left-hand side of the trailer and set it down right at the left-hand rear corner of the trailer. While I was lighting the third torch two people, with whom I was acquainted drove up from the direction of Springfield. They parked their car in front of the truck. While I was placing the third torch another car drove by, occupied by people I knew. All of the persons I have mentioned were witnesses in this case. After the last persons mentioned left, I placed the third torch at the left-hand corner in the rear of the trailer. After the torches were lit I got out a flag and jabbed its standard into the back of the trailer. Then I rode into Elkhart to ask assitance from my company. I then returned to the truck. It had begun to get a little darker and I got my fusees out, six of them. I struck one of them and walked ten or fifteen feet back of the flare and stuck it on the right-hand side of the pavement in the dirt,as near to the pavement as I could get it. That was about 110 or 115 feet south of the truck. I lit the fuse--it makes a real red flame about sixteen or eighteen inches high. I got a flashlight and stood at the rear of the truck so as to warn the traffic. Just a short time prior to the collision I heard an automobile approaching from the south (which was the car of the plaintiff). The plaintiff was then about three thousand feet to the south. I could hear the singing of the tires on the wet pavement. I stationed

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The pr[illegible]

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while [illegible]

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a little. [illegible]

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dark [illegible]

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hand corner [illegible]

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or fifte[illegible]

of the pa[illegible]

There was [illegible] of it [illegible]

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traffic. [illegible]

mobile [illegible]

The pr[illegible]

could [illegible]

myself at the rear of the truck and when plaintiff's car was about 1500 or 2000 feet from me I turned on the flashlight. I then discovered a car approaching from the north and I decided to flag it, otherwise there would be a collision between the car approaching from the north and the one approaching from the south. I started flashing the flashlight backwards and forwards and up and down, but both cars kept on coming. When plaintiff's car was about 100 feet from me the car was approaching from the opposite direction and I then jumped across the road to avoid being struck by plaintiff's car, and as I jumped out of the way of plaintiff's onrushing car, it ran into the back of the trailer. The car going south could not be identified. I went immediately to the plaintiff's car and opened the front door and found the plaintiff sitting behind the wheel of his car. I asked him if he was hurt and he stated that he was not. I then went to the rear of the car, to the right-hand door and opened it and asked Mrs. Nystrom if she was hurt. She acted as if she were stunned. I then returned to the left side of the car and by that time plaintiff had started to get out of the car. After the plaintiff got out of the car I said to him, 'Man, can't you see those lights burning down there?' and the plaintiff replied, 'I see them now.' The lights were still burning. At that time I pulled a light from under the car which had been pushed under it by the impact and it was still burning. I also asked the plaintiff if he could not see me and that I had been flashing a flashlight. He said he did not know what the light meant, that it might have been a holdup. The plaintiff came right on, running over one light, running past another light, and hit this eleven-ton truck, with its brakes on, standing on the concrete, and shoved it forward from three and a half to four feet."

Two witnesses testified that they arrived at the place where the truck was stalled at about six o'clock. One of them testified that she saw the truck driver place a torch on the pavement fifty feet in front of the truck and a torch fifty feet to the rear of the truck on the pavement, and that both torches were lighted. The

other witness testified he saw the truck driver light his torches and place them, one within about eight or ten feet of the left of the truck--the second fifty or seventy-five feet to the rear of the truck, on the pavement within two feet of the black line, and the third torch on the pavement about fifty feet in front of the truck. Two other witnesses also testified for the defendant on the question of lighted torches being on the pavement before the collision. One of them said that he saw a torch in front of the truck and when he passed the truck the driver was taking a torch to the rear of the truck. The other witness stated that when he passed the truck about six o'clock, he saw the truck driver lighting torches. All of these witnesses were acquainted with the truck driver before the collision. An automobile investigator for the Secretary of State testified that he arrived at the place of the collision at about 8:20 o'clock the evening of the accident and that when he arrived he saw three lighted torches on the highway; one was two hundred feet ahead of the truck, one was in the center of the highway at the rear left-hand corner of the truck, and another torch was two hundred feet behind the truck. He also observed fusees stuck in the ground at the edge of the pavement to the rear of the truck about fifty feet therefrom. He did not know what had happened between the time of the accident and the time he arrived at the place of the collision.

The conflict of evidence is substantial on material facts in the case, and it cannot be reconciled. There is sufficient evidence introduced by the plaintiff to sustain the verdict. Under such conditions the rule is that the verdict of a jury will not be set aside unless it is against the manifest weight of the evidence. The determination of the weight of the evidence in this case depends upon the credibility of the witnesses. We have carefully considered the whole of the evidence, and it cannot be fairly said that the verdict is against the manifest weight of the evidence. (Carroll v. Krause, 295 Ill. App. 552; Garman v. Smith, 263 Ill. App. 297).

other witness was called [illegible]
and plaintiff's [illegible]
the truck--[illegible]
truck, on [illegible]
third zone [illegible]
Two other [illegible]
of lighted [illegible]
of them still [illegible]
passed the [illegible]
truck. [illegible]
six o'clock, [illegible]
witnesses were [illegible]
an automobile [illegible]
be arrived at [illegible]
evening of the [illegible]
torches on the [illegible]
was in the [illegible]
truck, and [illegible]
also observed [illegible]
to the rear of [illegible]
what had happened [illegible]
arrived at the [illegible]

The counsel [illegible]
case, but it [illegible]
introduced [illegible]
[illegible]
unless [illegible]
action of [illegible]
credibility [illegible]
of [illegible]
against the [illegible]
life. [illegible]

It is also contended that the trial court committed reversible error in overruling defendant's objections to four questions asked the plaintiff during his examination in chief, on the ground that the questions were leading and suggestive. We have examined the questions as they appear in the record, and in our opinion the questions were direct and not suggestive in form.

Objection is made that the verdict of $10,000.00 is excessive. The evidence as to the plaintiff's injuries is uncontradicted. The evidence shows that he endured great pain and was confined to a hospital for two weeks and that later his leg was placed in a splint for three months, and that he sustained a transverse fracture of the right knee cap which made it necessary to keep the leg extended so that the broken bone would remain in place during the healing time. As a result there was a formation of a ridge of bone within the joint preventing a normal movement of the leg and also atrophy of the muscles of the leg. Plaintiff is unable to walk upstairs except by placing his left leg on a step and lifting the other up. If he walks several blocks his leg becomes tired and begins to pain him and he sometimes falls, owing to the knee giving way. The injury to the knee likewise prevents the plaintiff from remaining on his feet for any extended time. The weakened condition of the leg has prevented him from standing alongside of an operating table and also acting as an obstetrician. Prior to the accident he did at least one surgical operation each week. Owing to his inability to attend surgical and obstetrical cases he has found it necessary to refer such cases to other physicians. During the year 1936 his total earnings were slightly in excess of $14,000.00 from his profession of medicine and surgery. The evidence shows that the growth of bone into the joint and the atrophy of the muscles of the leg are permanent. As before stated the plaintiff at the time of the accident was about fifty-three years of age. In our opinion the damages awarded by the jury are not excessive. (Wheeler v. Chicago etc. R.R. Co., 182 Ill. App., 194; Metz v. Yellow Cab Co., 248 Ill. App., 609, p. 621.)

[illegible]

error in [illegible]

the plaintiff [illegible]

the question [illegible]

questions [illegible]

questions were [illegible]

Objection [illegible]

The evidence [illegible]

evidence shows [illegible]

hospital for [illegible]

for those [illegible]

the night [illegible]

so that the [illegible]

As a result [illegible]

preventing [illegible]

of the [illegible]

his left [illegible]

blocks his [illegible]

fall, and [illegible]

proverb [illegible]

time. [illegible]

ing along [illegible]

Prior to the [illegible]

Owing to [illegible]

has been [illegible]

the year [illegible]

from his [illegible]

the growth [illegible]

the law [illegible]

the [illegible]

dense [illegible]

etc. [illegible]

app., 309, [illegible])

It is further contended that the Court erred in giving, modifying and refusing instructions. In separate counts of the complaint, section 57 B., section 103 (Article 15) and section 202 (Article 15) of the Motor Vehicle Law were quoted and violations of each by the defendant alleged. The answer denies the violations of the sections and alleges that the plaintiff complied with the provisions of the sections. Excluding the question of contributory negligence, the case was defended on the question as to whether the truck driver had placed lighted flares or torches, as required by statute, behind the truck before the accident, and whether statutory lights were displayed on the rear of the standing truck. The evidence introduced by the plaintiff as to the nature, extent, and permanent results of the injury sustained by the plaintiff is uncontradicted.

Four instructions were presented and given on behalf of the plaintiff. Each of the first three instructions stated: "The court instructs the jury that on April 25, 1937, the statutes of the State of Illinois provided as follows:". In instruction No. 1 section 202 of the Motor Vehicle Law was quoted. In instruction No. 2 section 103 of the law was quoted, and in instruction No. 3 section 57 B of the law was quoted. The fourth instruction is on the question of damages. It is argued that other instructions should have been given by the plaintiff explaining the statutory provisions and constructing their legal effect. In the case of Ward, v. Merrith, 220 Ill., 66, it is stated: "We have held in many cases that no error is committed in giving an instruction in the substantial language of a statute." If the defendant thought that the court should have given the jury a definition of a word found in the quoted sections, it should have tendered an instruction according to its understanding of the meaning which the court has given to the word or other provisions of the statute. (Lichenstein v. Fish Furniture Co., 272 Ill., 191, Heffeman v. Bail, 109 Ill. App. 231.)

The first two instructions given for the plaintiff are criticized by the defendant as being in part inapplicable to the issues in the case. It is stated by the defendant in effect that the jury may have arrived at its verdict that the defendant was guilty of negligence which caused the collision because these two instructions stated in the words of the statute, that a motor vehicle on the highway should be equipped with headlights which should be lighted after dark. The evidence of the plaintiff tends to prove that the headlights on the truck were not burning at the time of the accident. The defendant testified that he turned on the headlights of the truck when he left Springfield. Whether the headlights on the truck were lighted at the time of the collision appears only incidently in the evidence. This contention is without merit.

It is also contended that the first three instructions of the plaintiff are confusing and misleading. With this contention we do not agree. It is also argued that the fourth instruction given for plaintiff is bad in form because it is so worded that the jury probably understood therefrom that the judge was of the opinion that the nature and extent of the injury sustained by the plaintiff was proved by the greater weight of the evidence. In the first place, the testimony as to the extent and nature of the plaintiff's injury is uncontradicted. Also, by the use of the words "if any" throughout the instruction it is not reasonable to believe that the jury construed or understood the instruction as contended by the defendant.

It is contended that the court erred in modifying the 14th instruction presented by the defendant. The instruction will be understood by quoting a part of the instruction and showing the modification by the court in italics: "If you find from the evidence said truck was left in such position on said hard road with lights lit and flares or other signals placed to warn travelers upon the highway of the location of the truck IN THE MANNER AND LOCATED AS BY

STATUTE PROVIDED AS SET FORTH IN THESE INSTRUCTIONS, and not withstanding the placing of said flares and lights the accident happened by reason of the failure of the plaintiff to exercise care as he approached said truck, then under such state of proof there can be no recovery." It is our opinion that the modification brought the instruction within the issues and the law of the case, and made it conform to other instructions given by the court. The instruction as offered stated that if the truck was left on the hard road "with lights lit and flares or other signals placed to warn travelers upon the highway" etc. Surely the instruction needed modification in some respect to explain that the flares must have been placed as provided by statute or that the defendant had used reasonable and ordinary care in an endeavor to comply with the statute.

It is also contended that the court erred in refusing defendant's instruction No. 2. This instruction states that the defendant was only required to use reasonable and ordinary care in the placing of lights or flares back of its truck for the purpose of warning others traveling upon the highway of the location of the truck, and that if the jury believed from the evidence that the driver of the truck did exercise such reasonable care in placing of lights and flares for the warning of those traveling on the highway, and notwithstanding the exercise of such care by the driver of the truck, the accident occurred, resulting in injury to the plaintiff, there can be no recovery. The instruction is directory in form and should have been accurately drawn. It is urged by the defendant that this was the only instruction presented which stated the law as to the duty of the defendant with reference to a compliance with the statute, (namely, that the defendant was only required to use reasonable and ordinary care) and that the jury might have gained the impression from hearing the statute read that the various provisions were mandatory and that a failure to strictly comply therewith constituted negligence. The statute fixed a standard of care or conduct which the defendant was to observe and obey as reasonable and ordinary

care under the facts shown in evidence. Failure to exercise this standard of care by the defendant was prima facie evidence of negligence which principle of law was ignored by the instruction. If the defendant understood that the law required that the defendant exercise only reasonable and ordinary care in complying with the statute and it desired the jury to be instructed in conformity to that understanding, it should have offered an instruction containing a statement of the law as defendant understood it.

A motion was made by the appellant in this court to strike a short additional abstract from the record, filed by the appellee. The motion was taken with the case. This additional abstract was of some assistance to this court in passing upon the facts disclosed by the evidence and the motion to strike the additional abstract is hereby overruled.

We find no reversible error in the trial of the case and the judgment of the trial court is hereby affirmed.

Judgment affirmed.

DOVE, J. dissents.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(73815—5M—3-32)

PUBLISHED IN ABSTRACT

Marie Quell, Plaintiff-Appellee, v. John Jachino, Defendant-Appellant.

Appeal from the Circuit Court of Montgomery County.

APRIL TERM, A. D. 1938.

Gen. No. 9124 **Agenda No. 7**

MR. JUSTICE HAYES, delivered the opinion of the court.

Hereafter in this opinion Marie Quell, plaintiff-appellee, will be referred to as Plaintiff, and John Jachino, defendant-appellant, as Defendant.

This is an appeal from the Circuit Court of Montgomery County, from a judgment entered in an action on an appeal from a Police Magistrate Court, in favor of the plaintiff Marie Quell, and against defendant John Jachino, in the amount of forty-five ($45.00) dollars. The case was heard by the Court without a Jury.

The evidence shows, that the plaintiff was the wife of Charles H. Kerr until December 18, 1936; that on the 5th day of May, 1936, the plaintiff, then Marie Kerr, obtained a judgment against Charles H. Kerr, in the Circuit Court of Montgomery County, Illinois for the sum of fourteen hundred fifty seven dollars and fifty cents, ($1,457.50), and that she also obtained another judgment on the same date in the same court against Charles H. Kerr, for the sum of eleven hundred sixty six ($1,166.00) dollars; that on the date of said judgments, Charles H. Kerr, was the owner of the South half (S½) of Lot Seven (7), block thirty one (31), of the original plat of Nokomis, Illinois; and on September 15, 1936, he leased the same, by a written lease, to the defendant for a period of two years, with privilege of renewal for five additional years, at twenty five ($25.00) dollars per month. The defendant took possession of said premises as tenant, and paid the twenty-five dollars a month to the said Charles H. Kerr, for October, November, and December, 1936.

On December 18, 1936, Charles H. Kerr, Marie Quell Kerr, and Anna Kerr Graham, a former wife of Charles H. Kerr, entered into a settlement of litiga-

tion, involving themselves, and executed the following release:

> "For and in consideration of the execution of various deeds, both warranty and quit-claim, this day executed, and for the further consideration of the releasing of several judgments in the Circuit Court of Montgomery County, Illinois, on this the 18th day of December, A. D. 1936, and in settlement of a certain law suit pending in the Circuit Court of Montgomery County, Illinois, being known as Cause No. 36-1937, wherein Anna Graham was plaintiff, and Charles H. Kerr and Marie Quell Kerr, were defendants, the undersigned do hereby for themselves release any and all claims or demands or rights of action of one against the other, and all actions, claims or demands of any kind or character of one against the other are hereby finally determined and completely settled and adjusted."

On the same day, Charles H. Kerr and Marie Quell Kerr, his wife, conveyed, by quit claim deed, the title to the property in question to Lester Vandever, her attorney. The plaintiff herein, then procured a decree of divorce from the said Charles H. Kerr, and the title to the above property was then re-conveyed by Lester Vandever to the plaintiff, by quit claim deed on the same day. Plaintiff then released the two judgments above referred to, which she had held against Charles H. Kerr. It was stipulated in the court below, that the plaintiff had notice that the defendant was in actual possession of the premises on December 18, 1936, when she took title, and his actual possession from September 15, 1936, is not disputed. The plaintiff collected the rent from the defendant at the rate of twenty five dollars per month for the months of January, February, March, April, May and June, 1937. On December 18, 1936, Charles H. Kerr notified the defendant in writing, that Marie Quell was then the owner of the premises in question and entitled to all the rents from and after January 1, 1937.

The purpose of the suit was to collect forty five ($45.00) dollars per month as rent rather than twenty five ($25.00) dollars. For the period of the lease, with the extension, would make a difference of about fifteen hundred ($1500.00) dollars. Defendant urges two propositions for reversal of the judgment: (1). The plaintiff cannot legally rely upon the released judgments to defeat the terms of the written lease, even

though the judgments were a lien against the real estate prior to the execution of the lease, when she, with full knowledge of the existence of the lease, voluntary released her judgments. (2). Conceding for the purpose of argument, that she could rely upon her released judgments, her acceptance of rent for a period of six consecutive months after she had full knowledge of the terms of the lease and the right of the appellant to renew the lease for a period of five annual renewals, amounts to a ratification of the lease and estops her to question the provisions thereof.

Plaintiff in reply to point number one, states:

> "We readily admit that we do not know of any decision of an upper Court in a case where the judgment lien was obtained prior to the execution of the lease, and a voluntary conveyance was made subsequent to the execution of the lease. However, there are numerous Illinois cases, some of which are cited in our brief, to the effect that if a mortgage is given, then a lease executed, then in settlement of the mortgage indebtedness the mortgagor conveys the property to the mortgagee, the mortgagee takes same without it being subject to the lease. It seems to us that this is very nearly analagous to this case."

In support of her position, plaintiff cites the following cases:

Moffet v. *Farwell,* 222 Ill. 543, 548;
Richardson v. *Hockenhull,* 85 Ill. 124;
Campbell v. *Carter,* 14 Ill. 286;
Edgerton v. *Young,* 43 Ill. 464;
Shippen v. *Whittier,* 117 Ill. 282;
Lowman v. *Lowman,* 118 Ill. 583, 586, 587.

In *Campbell* v. *Carter,* it is said: "The conclusion from all the authorities clearly is, that if a party acquires an estate upon which he has an incumbrance, the incumbrance is, in equity, considered as subsisting, or extinguished, according to his intentions, expressed or implied. The intention is the controlling consideration, where it has been made known, or can be inferred from the acts and conduct of the party. And the court will look into all of the circumstances of the case, to ascertain his real intention. If it appears, that he intended to discharge the incumbrance, and rely exclusively upon his newly acquired title, the incumbrance is regarded as extinguished, and cannot afterwards be set up to strengthen and support that title. If no intention has been mainfested, equity will consider the in-

cumbrance as subsisting, or extinguished, as may be most conducive to the interests of the party. The debt and security were both cancelled. The release of the equity of redemption was not the only consideration received. Besides the equity of redemption, he obtained the conveyance of warranty and the relinquishment of a dower interest in a lot, the lien having been released, the bank judgment attached upon the lot."

In *Moffet* v. *Farwell,* it is said: "Whether a merger results from a greater and less estate uniting in the same person depends upon what will best subserve the purposes of justice and the intention of the parties. This court has held the question always to be one of intention, and that the interests of the parties and their intentions are controlling considerations." (*Richardson* v. *Hockenbull,* 85 Ill. 124.) "The intention is the controlling consideration, where it has been made known or can be inferred from the acts and conduct of the party, and the court will look into all of the circumstances of the case to ascertain his real intention. If it appears that he intended to discharge the encumbrance and rely exclusively upon his newly acquired title, the encumbrance is regarded as extinguished and cannot afterward be set up to strengthen and support that title. If no intention has been manifested, equity will consider the encumbrance as subsisting or extinguished, as may be most conducive to the interest of the party." (*Campbell* v. *Carter,* 14 Ill. 286.) In *Edgerton* v. *Young,* 43 Ill. 464, it was held that whether a merger resulted from a greater and less estate meeting in the same person depends upon the intent and interest of the parties. It was said in *Shippen* v. *Whittier,* 117 Ill. 282: "The conveyance of the mortgagor's estate to the mortgagee does not operate as a merger, in equity, unless it was intended to have that effect." These principles are sustained by *Lowman* v. *Lowman,* 118 Ill. 582.

In every case cited by the plaintiff in support of his proposition, is a case in equity. The case at bar is not a case in equity, but at law, and circumscribed and limited to the jurisdiction given to Justices of the Peace. In appeals to the Circuit Court from Justices of the Peace, the court has no greater jurisdiction and power than was possessed by the Justice of the Peace. 299 Ill. 130, 131.

Plaintiff's counsel suggests in his brief, that although some equitable principles are involved, that

the Civil Practice Act permits in cases tried before the Court, the combining of legal and equitable causes. The Civil Practice Act covers only courts of record and does not include justices of the peace.

A judgment lien on real estate confers no title, legal or equitable thereto. *Hack* v. *Snow,* 338 Ill. 28. Section 1, Chapter 77, Illinois Revised Statutes 1937, page 1897.

In order for plaintiff to make out a prima facie case, she has to depend on her deed for title. The judgment lien does not permit her to bring an action for rent for she has no title to base her claim on. There is no privity between herself and the defendant except through the conveyance. Even if it were proper to consider this as a case in equity, the necessary elements of such a cause of action have not been established in this record. First, the insolvency of the judgment debtor, and second, that the market value of the property in question was not in excess of the two judgments. These elements would have to be established before the rights of the tenant in possession, under a written lease could be wiped out.

At the time the plaintiff released the two judgments, there was a release executed by Charles H. Kerr, Anna Graham, (wife number 1), and the plaintiff, (wife number 2), in which they severally released any and all claims, demands or rights of action, one against the other, and declared that all actions claims and demands were finally determined and completely settled and adjusted. The release further recited, that in consideration of the releasing of the several judgments in the Circuit Court of Montgomery County, and the settlement of a certain law suit pending in the Circuit Court of said county, wherein Anna Graham, first wife, as plaintiff, and Charles H. Kerr and Mary Quell Kerr, were defendants. In examining the circumstances surrounding these transactions to determine plaintiff's intention, in releasing of the two judgments she had against Charles H. Kerr, and the taking in lieu thereof the quit claim deed, it is apparent that this was a three way release,—that the first wife had a law suit pending against the plaintiff and Charles H. Kerr, and this was settled in the transaction; that a divorce of the marriage between the plaintiff and Charles H. Kerr was obtained, and that the plaintiff took her property free from marital rights of Charles H. Kerr; that there was a conveyance of other property than the property in

question, covered in this same transaction. This makes an altogether different case from one where the judgment amount to as much or more as the full value of the property, and where the judgment debtor is insolvent, and there is no other property on which to make the judgment or any part of it, and he takes a deed to it to save the expense of foreclosure and sale, and received no other or additional consideration. In *Campbell* v. *Carter,* the court said: "Not one of the cases cited goes further than to hold, where the mere equity of redemption is released and the note is cancelled, that the mortgagee may still rely upon the mortgage to protect his title. But this is a very different case. The debt and the security were both cancelled. The release of the equity of redemption was not the only consideration received by Farwell. Besides the equity of redemption, he obtained the covenants of warranty of the mortgage, and the relinquishment of a dower interest in the lot."

In the case at bar, the plaintiff received, in addition to the title to the Nokomis property, the release of a pending suit against her, brought by the first wife of Charles H. Kerr; a property settlement in her divorce case, and the relinquishment of Kerr's marital rights, and it appears from the recitals in the release that there was other property conveyed by warranty deed.

During the negotiations and just prior to this settlement, the question of this lease came up as shown by the testimony of J. T. Buckington, a lawyer who represented Charles H. Kerr. He stated that he had talked with Mrs. Quell's attorneys just before the contract settlement was made, and they talked about this business building in Nokomis, and that her lawyers objected to taking that piece of property for the reason there was a long lease on it, and they said they understood there was an option in the lease to buy it. He said that he advised them, after investigation, that there was no option to purchase, but that whatever there was, they would have to take it as it then was, and take their own chances with the tenant on it, and that Kerr would only give a quit claim deed to it.

It is further shown by the stipulation that the plaintiff knew, at the time she took the conveyance, that the tenant was in possession of the property. Purchaser is bound to inquire of the person in possession of real estate, by what tenure he holds and what interest he claims in the premises. *German American Bank* v. *Martin,* 277 Ill. 629.

It further appears that the defendant paid Charles H. Kerr, twenty five dollars a month up until the time the conveyance to the plaintiff was made; and that he paid each month, for six months thereafter, twenty five dollars a month to the plaintiff. The plaintiff cannot take the inconsistent position that she retain the benefits she derived under the mutual releases, and disaffirm her release of the two judgments in question. From an examination of the entire transaction, and of the accompanying circumstances, we are forced to conclude that her intention was to release the judgments in question, and is bound by her releases.

The force and effect of a written lease accompanied with actual possession for a period of six months should not be undermined or destroyed unless a case is clearly established as to facts and based on settled doctrines of law that require it. For the above reasons the judgment of the Circuit Court is reversed and cause remanded.

Reversed and Remanded.

(Ten pages in original opinion.)

(65269—10-7—14

PUBLISHED IN ABSTRACT

Floyd E. Madden, Administrator of the Estate of Helen M. Fear, Deceased, Plaintiff-Appellant, v. W. H. Sampson, Administrator, and Maude S. Brown, Administratrix of the Estate of Charles W. Sampson, Deceased, Defendants-Appellees.

Appeal from Circuit Court, Cumberland County.

APRIL TERM, A. D. 1938.

Gen. No. 9122 **Agenda No. 5**

MR. JUSTICE RIESS, delivered the opinion of the Court.

Plaintiff Appellant, Floyd E. Madden, as administrator of the estate of Helen M. Fear, deceased, brought suit for damages in the Circuit Court of Cumberland County against the personal representatives of the estate of Charles W. Sampson, deceased, for the benefit of the next of kin of Helen M. Fear, who had lost her life as the result of a collision between decedent Sampson's automobile and an automobile driven by one Mrs. Charles W. Closson. Upon trial by jury, both general and special verdicts were returned in favor of the defendant, and judgment was entered in bar of the action from which judgment the plaintiff has appealed.

The complaint, consisting of one count, charged the defendant's intestate, in substance, with wilful and wanton misconduct in the operation of his automobile in that he wilfully and wantonly drove the same at a speed which was greater than was reasonable and proper, having due regard for the traffic and use of the way, so as to endanger the life and limbs of the occupants of his said automobile, contrary to the provisions of Section 146 of Chapter 95½, Revised Statutes of Illinois; that he so wilfully and wantonly failed to keep a proper watch or lookout on the road in the direction in which his automobile was traveling, while driving at an excessive rate of speed; that he failed to decrease the speed of his automobile though driving

at a highly excessive rate of speed when approaching a special hazard, that he drove on the left side of the payment and drove without lights.

It appears from the evidence that at about five o'clock in the evening of December 9, 1936, plaintiff's intestate, Helen M. Fear, and Margaret Carroll, public school teachers at Greenup, Illinois, accompanied defendant's intestate, Charles W. Sampson, at his invitation and as guest passengers, on an automobile trip from Greenup to Charleston, Illinois. All three occupied the front seat. Defendant's intestate was driving the automobile and Miss Carroll was sitting in the center. At about five thirty o'clock that evening, defendant intestate's car collided with an automobile operated by Mrs. Charles W. Closson. The collision was almost head on, and both Charles W. Sampson and Helen M. Fear were killed.

Defendant's intestate was driving his car in a northerly direction on the right or east side of the marked center line of an eighteen foot concrete paved state highway. Mrs. Closson, a farmer's wife, who was driving her car in a southerly or opposite direction, had mistaken a farm culvert on the east side of the pavement for a connecting gravel road on which she intended to turn off to a farm house on her left and had pulled across the black line and started to leave the state highway. Seeing her mistake, she had swung her car or continued toward the point at which she intended to leave the pavement, at a rate of speed, as testified by her, of between seven and ten miles per hour, driving on the left side of the pavement directly in front of the oncoming Sampson car.

Apparently defendant's intestate saw the Closson car for the first time immediately before the accident, at which time he exclaimed: "Oh my God." Miss Carroll fixed the speed of the Sampson car at fifty miles an hour five or six minutes before the collision, and as near sixty miles an hour at the time of the collision. She testified that the pavement was dry; that it was beginning to get dusk; that Sampson was driving on the right side of the black line; that she saw Mrs. Closson's car the minute they hit, and that she did not know whether or not her lights were on; that she did not know where the Closson car came from, that it was immediately in front of them when she looked up from a basket ball score which she and Miss Fear were examining. Mrs. Closson estimated the speed of the

Sampson car at sixty-five miles an hour, and the speed of her own car at seven miles an hour. She testified that her lights were burning brightly and that she saw the headlights of the approaching Sampson car. She had no definite recollection and could not say whether she had ever pulled back on the right hand side of the road after making the turn at the farm culvert by mistake.

Plaintiff argues that the Court erred in entering judgment for the defendants upon the verdict for the reason that it was contrary to both the law and the evidence; that the Court erred in the giving and refusing of instruction.

As a guest passenger, it devolved upon the plaintiff under the provisions of the Illinois statute to allege and prove the injuries, death and loss sustained to have been proximately caused or contributed to by wilful and wanton misconduct on the part of the owner or driver of the car in which the decedent was riding. Chapter 95½, Section 58a, Illinois Revised Statutes.

On the trial of this cause, the Court, at the request of the defendant, required the jury to find specially on the following question of fact, namely: "Did deceased, Charles W. Sampson, at and immediately before the time of the collision which resulted in the death of Helen M. Fear, act wantonly, wilfully and with reckless disregard of the rights of deceased?" The answer to this interrogatory was "No."

The plaintiff filed a written motion for a new trial, setting up a number of grounds therefor, but made no specific objection to the special finding, nor did the plaintiff file any motion to set aside this special finding nor assign error thereon in this court.

It has been held by the Courts of Review of this State that the defendant is conclusively bound by a special finding of fact, such as is here involved, unless error has been assigned thereon, and the question has also been raised on the motion for a new trial. *Taake* v. *Eichhorst*, 344 Ill. 508, 176 N. E. 765; *Brant* v. *Chicago & Alton R. R.*, 294 Ill. 606; 128 N. E. 732; *Brimie* v. *Belden Mfg. Co.*, 287 Ill. 11, 122 N. E. 75; *Rockwood Sprinkler Co.* v. *Phillips Co.* 265 Ill. App. 267; *Westbrook* v. *Chicago and N. W. Ry. Co.*, 248 Ill. App., 446.

The abstract of the record fails to show whether judgment was entered upon the special verdict of the jury or on the general verdict.

Paragraph 189 of Chapter 110 on Practice, State Bar Association Statutes (1937) provides that "In any case in which the jury render a general verdict, they may be required by the Court and must be required on request of any party to the action to find specially upon any material question or questions of fact which shall be stated to them in writing."

This paragraph further provides that "When the special finding of fact is inconsistent with the general verdict, the former shall control the latter, and the Court may enter judgment accordingly." The special verdict was not questioned in the lower court, nor by assignment of error here, and the plaintiff is in the same position now, in so far as the special verdict is concerned, as if he had failed to file a motion for a new trial in the lower court.

It was not alleged nor set forth in the motion for a new trial that erroneous instructions or errors in the admissal or refusal of evidence had in any way affected the special verdict which was rendered by the jury in this case.

It is well established that where a party files a written motion for a new trial, he will be held to waive all causes therefor not set forth in his written motion. *Lerette* v. *Director General,* 306 Ill. 348, 356; 137 N. E. 811; *People* v. *Petrilli,* 344 Ill. 416, 420, and citations, 176 N. E. 437.

The jury, having expressly found by its special verdict that the defendant's intestate did not act wantonly, wilfully and with reckless disregard of the rights of deceased, before and at the time of the collision, as charged in the complaint, this question is conclusively established in appellee's favor and for the reasons heretofore stated, the judgment of the trial court must, of necessity, be affirmed.

Judgment Affirmed.

(Five pages in original opinion.)

65269—10-7—14

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Further back
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STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

MAY TERM A.D. 1938.

TERM NO. 19 AGENDA 12

FRED PRELOGER, JR., Plaintiff-Appellee,	)	Appeal from the
vs	)	Circuit Court of
VILLAGE OF MARYVILLE, a Municipal Corporation, Defendant-Appellant.	)	Madison County.

297 I.A. 651

STONE, J.

This is an appeal from the Circuit Court of Madison County which rendered judgment in favor of Appellee and against Appellant in the sum of $1250.00 for injuries to appellee, received while playing in one of the streets of the village.

Appellee's complaint alleges that on October 15, 1934, and for many years before that date, the appellant as a village, was in possession and control of Main street and the westerly extension of Main street in said Village, and also Center street and its westerly extension or widening thereof, including the location of the drainage inlet therein described, as a public street and place for public use and for the purpose of draining the surface water on public streets and places in said neighborhood; and that the appellant had constructed or caused to be constructed, for its use, a certain catch basin or drainage inlet which was sunk into the ground so that the upper portion of it was level with the surface of the ground, and that same was covered with a perforated lid, being a piece of perforated iron, fastened at one point; that the inlet was circular in shape and about twenty inches in depth and located near the southwesterly corner of Main street and the westerly extension thereof andCenter street and the westerly widening thereof, in the Village of Maryville; that the same was within a few feet of a stop sign; that the catch basin was about six feet from the northeasterly corner of the building at the southwest corner of the intersection, and that was occupied by one James Gibson, and which was a part of the public cinder sidewalk, on the west side of West Center street and near to or adjoining Main street, extending across Center street.

The complaint then alleges that the location, condition and construction of said drainage inlet and of said perforated cover thereon

and the danger arising therefrom was known to the appellant, or by the exercise of due caution could have been known by it. The complaint then alleges that the condition had prevailed for a long space of time, to wit, six months, and that the President of the Village Board was in charge of the work of locating and constructing said catch basin or drainage inlet, and that the top of said drainage inlet was open to public view.

The complaint then alleges that the appellee was a boy about 18 years of age and lived with his father, and did not know the conditions concerning the catch basin and drainage inlet and did not realize the dangers incident thereto; that the appellee, together with some other children, on the evening of October 15, 1934, between the hours of 8 and 9 o'clock, was playing in the neighborhood of the catch basin inlet after dark, and, while he was in the exercise of due care and caution for his own safety, he stepped on top of the drainage inlet and part of his foot or leg went into the drainage inlet, by reason of the top not being securely closed or fastened thereon, or by reason of the same being partly opened, or by reason of the same being shifted by the weight of his foot coming into contact therewith, and that the appellee broke his leg.

It is next alleged that the appellant did one or the other or all of the following acts and thereby caused the injuries to appellee:

(a) Negligently constructed or caused to be permitted to be constructed the said inlet in and upon said public place without exercising reasonable care and diligence to provide a cover thereon with fastenings to hold the same in place.

(b) Negligently failing to exercise due and reasonable care to provide proper barriers or safeguards to prevent the public using the said place from stepping upon and into the said drainage inlet.

(c) Negligently failing to exercise reasonable care to keep its streets at the point mentioned in reasonably safe condition for travel by providing lighting at night or other methods of warning persons having occasion to use said public place from being injured by reason of the conditions of the said drainage inlet by reason of its insecure fastenings and condition.

(d) Negligently failing to exercise reasonable care and diligence to keep the top of said drainage inlet secure and in place so that the same would not be open or shifted by the weight of persons walking over the same.

(e) By failing to exercise reasonable care and caution to keep the space covered by the said catch basin and the lid thereon in reasonably safe condition for public travel, especially during the night.time.

Appellant filed its motion for judgment in the nature of a demurrer, and, as grounds for its motion, stated in substance, that appellee did not, in his complaint, state that the public cinder sidewalk was owned, controlled, constructed or reconstructed by the appellant; that appellee did not allege in his complaint that said catch basin was located in streets or property controlled by the appellant; that appellee did not, in his complaint, allege when said streets were widened or extended; that appellee did not allege in his complaint that said catch basin was constructed on authority and with the consent of the appellant, or that appellant had assumed control of said basin as a part of appellant's property; that appellee did not allege in his complaint that the President of the Village Board was acting in his official capacity or under directions or resolutions of the Village Board in constructing and locating said catch basin; that appellee did not allege in his complaint when appellant took possession and control of Main street and the westerly extension of said Main street in said Village, and also of Center street and its westerly extension or widening thereof, including the location of the drainage inlet mentioned in the complaint, and that the complaint did not show that the extensions or widenings of said streets were used for public streets and altered for that reason; that the allegation in the complaint that appellee was in the exercise of due care and caution for his own safety is inconsistent with the allegation in the complaint that he is a person of 18 years of age and was playing in the location of the catch basin with a number of boys.

The motion of the appellant coming on for hearing, the Court overruled said motion, and thereafter the appellant filed its answer to the complaint and, in substance denied all of the material allegations contained in appellee's complaint.

In addition to the denials contained in appellant's answer, it further stated therein the fact to be that any extension, widening or other property adjacent to or near the established streets of Main or Center streets is the property of the State of Illinois, and that said property, which is located in the description as furnished by said extension or widening, has never been the property of appellant, but has been owned and controlled by a number of persons previous to the State of Illinois acquiring title; that appellant does not own, control or

possess any cinder sidewalks at the point described by appellee, and that the ground, as described by appellee, is owned by the State of Illinois, and has in the past been owned by numerous people and corporations, and that said ground has never been a part, and is not now a part, of the streets or sidewalks or land which are owned, controlled or possessed by appellant.

Later, leave of Court was granted to appellant to file an amendment to its answer, the amendment in substance, states that appellee, when passing over or near said drain inlet, was not in the exercise of due care and caution for his own safety, and that appellee was guilty of negligence which caused or contributed to his accident, and to whatever injuries he received. That the acts of negligence charged to said appellant in the complaint were not the proximate cause of the accident and injuries to the appellee; that whatever injuries appellee received were as a direct result of the acts and doings on the part of the appellee and his associates while playing in the neighborhood of said catch basin, and that the accident and injuries were not the result of any acts of negligence or improper conduct on the part of appellant.

The amendment to appellant's answer further states that Center street is an unpaved but improved road or highway which runs through the Village of Maryville in an easterly and westerly direction, and which street intersects Illinois State Highway Route 159, and that the Illinois State Highway Department has erected at that point at which Center street connects with Illinois State Highway Route 159, a stop sign, which sign has upon it the word "Stop", and which sign is attached to a wooden post approximately 5 feet in height, 6 inches thick, and which post has been placed in the ground and made permanent, and that said stop sign is erected, maintained and controlled by the State of Illinois, and over which the appellant has no control or management; that the appellee, at the time he passed over or near to the inlet, as described in appellee's complaint, ran into and struck with great force and violence the stop sign above mentioned in and near said drain inlet, and received the injuries of which he complains; that the injuries received by the appellee were the direct result of his acts and doings in striking said stop sign and post, in playing with his associates.

Thereupon the appellee filed a reply to the amendment to appellant's answer, and specifically denied the allegations contained in appellant's amendment to its answer.

The cause was then tried before the court and a jury, and after the evidence was presented to the jury, the jury returned a verdict in favor of the appellee, and assessed his damages the sum of twelve hundred fifty dollars.

Appellant's motion for a new trial set up many matters, among them that a new trial should be granted on account of newly discovered evidence. This new evidence showed no affirmative defense, but tended to contradict one witness. It was in the sound discretion of the court to allow or not, a new trial on this ground, and we do not think the court erred in denying the motion on this ground. The other matters most of which are assigned as error, here will be dealt with as the opinion proceeds.

The court properly denied appellant's motion to dismiss, as the complaint contains sufficient allegations to charge appellant with responsibility for maintaining the place of injury, if the injury was received through negligence of appellant in maintaining such place.

Appellee in this case at the time of his injury was eighteen years of age. He was playing in the street with some other boys on the date of his injury. Plaintiff, on running along the street where the manhole in question is, as a part of the game they were playing, came upon this manhole in the night time. He slipped partly into the hole and his leg was broken. He did not at the time know what he had fallen upon, but later learned what it was. Early the next morning his father saw the place in question, and the lid was partly removed. This lid was a piece of iron 30 by 30 inches, and fastened at one point. There is evidence on behalf of appellant which tends to establish that appellee was not injured as he claims, but was injured by running into a stop-sign located near to the manhole. Appellant also offered evidence that a light from the tavern gave light sufficient to see at the point where plaintiff was injured. Also that at the time they went to see the place where appellee was injured, the lid was correctly upon the base.

The evidence fairly tends to prove the material allegations of fact alleged in the complaint. The manhole in which plaintiff was injured, was placed there by the city for its use and benefit. The city was therefore charged with the responsibility of keeping it in a reasonably safe condition so as not to permit any person to be injured because of its unsafe condition. This hole was close to the sidewalk; it was at a corner;

there were no lights there, except such as shone from the back door of a saloon. Plaintiff came upon it in the night time without any warning as to its being there. The lid slipped and a part of his foot slipped into the hole and his leg was broken. At the time plaintiff was apparently doing what any boy of his age might be doing under like circumstances. Much evidence was offered by appellant, some of it contradictory of the above statements. Nothing was shown, however, which was conclusive. All questions which we find in this record about which testimony was given are purely questions of fact for the jury. Our Supreme Court has so often said, and we have so often held, that unless the verdict is against the manifest weight of the evidence the court will not disturb verdicts because of findings of fact, that we need not cite authorities on that principle.

Complaint is made of the following instruction:

> "The court instructs the jury that the plaintiff at and before the accident and injury was not required to exercise the highest degree of care for his own safety, but was only required to exercise that degree of care which an ordinarily prudent boy of his age, capacity, experience, education and intelligence would exercise under the same or similar circumstances."

This instruction has been approved in Schubert vs Patera, 310 Ill. 419. We see nothing in this instruction which might have mislead the jury. The judgment of the Circuit Court is affirmed.

JUDGMENT AFFIRMED.

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IN THE

APPELLATE COURT OF ILLINOIS,

Fourth District.

H. F. ENLOE, Plaintiff-Appellee,	Appeal from Circuit Court of Williamson County, Illinois.
vs.	297 I.A. 651
CONSOLIDATED COAL COMPANY OF ST. LOUIS, a Corporation, Defendant-Appellant.	Honorable D. F. Ramsey, Judge Presiding.

STONE, J.

This is an appeal from a judgment of the Circuit Court of Williamson County, Illinois, against the Consolidated Coal Company of St. Louis, defendant, in the sum of $500.00, for damages alleged to have been done to lands belonging to H. F. Enloe, plaintiff. The damage is claimed for injury to the land caused by mineral water pumped from defendant's mine through a ditch adjoining plaintiff's land.

Issue was taken on the questions of the permanency of the damage and the amount of damage. Plaintiff owns 9.3 acres of land, 1.5 acres of which are occupied by a four room house, a small barn, a chicken house, other small sheds, and two wells.

The mine water began to flow through the present ditch in 1932. Plaintiff testified that he saw the land in 1934 and there was water on two or three acres. He also testified that the mine water wrecked one of his wells. He stated that he had no experience in buying and selling land; that "the farm was worth $4,000.00"; and "the fair cash market value of it in my judgment as I saw it after the water had run over it was probably $2,000.00". The only date connected with the $4,000.00 estimate was the year 1930.

The witness Saeger testified that in 1932 the water began to overflow this land and "killed" about two-thirds of it. He testified that in his judgment the land was worth $4,000.00

No. [illegible]

H. F. HUDSON,

[illegible]

vs.

CONSOLIDATED COA[illegible]
ST. LOUIS, [illegible]

[illegible]

STONE, J.

This is an appeal from [illegible]
Williamson County, Illinois [illegible] General Company of St. Louis, [illegible] damages alleged to have [illegible] Judge, plaintiff. The [illegible] by mineral w[illegible] for [illegible] the plaintiff's land.

Issue was taken [illegible] damage and the amount of [illegible] land, 1.6 acres [illegible] small barn, a [illegible]

The mine [illegible] 1922. Plaintiff [illegible] there was a [illegible] the mine water [illegible] no experience in [illegible] worth $4,000.00"; [illegible] judgment as I saw it [illegible] $2,000.00". The [illegible] was the year 1922.

The without [illegible] to overflow [illegible] testified [illegible]

in 1930 and $1700.00 or $1800.00 in 1936, and that the mine water accounted for the difference in value. He testified further that in 1920 the land produced 70 to 75 bushels of corn per acre and that sixteen years later, in 1936, it produced 25 to 30 bushels for the whole five or six acres. He has never seen the effect of mineral water removed.

Press Triplet cultivated the land in 1934 and had a good crop. He stated that irrespective of mine water it would be unusual if the land were not overflowed at least once in twelve months by the creek. He said three-fourths of an acre was wet in 1934.

Homer Tubbs was on the land for several years beginning in 1931. He thought it would take ten years to rebuild the land after copperas water had been on it. He thought it would cost more than the land was worth. He gave no basis for this opinion.

Where the suit is for permanent injury to land the burden is upon the plaintiff to establish that the condition created after subsidence of the water is practically irremediable. COLLINS v. COSGROVE MEEHAN COAL CO., 279 Illinois Appellate, 98, 102. The testimony is vague on the amount of the land injured by the water, the present productivity of the land, the former productivity of the land, and on the possibility of restoration of the land. It does appear that the device by which mine water is cast on the land is removable. We think that the situation here presented is indistinguishable from that presented in COLLINS v. COSGROVE MEEHAN COAL CO., supra, and in VOLGER v. CHICAGO AND CARTERVILLE COAL CO., 180 Illinois Appellate, 51, and that the evidence is clearly insufficient to support a finding of permanent injury to the land, or to any specified portion thereof.

We are further of the opinion that if permanent injury had been shown there was no evidence, competent for a jury to consider, as to the money damage resulting from the injury. No one who claimed to have knowledge of land values testified. Such testimony as there was made no distinction between the land cultivated and the improvements. No account was taken of depreciation

in 1930 and $270.00 [illegible]

water as counted for the [illegible]

further that in 1930 [illegible]

per acre and [illegible] sixteen

to 30 bushels of the [illegible]

the effect of mineral water [illegible] eye.

Press Exhibit [illegible]

crop. He stated in [illegible]

if the land was not over [illegible]

by the owner. [illegible]

Hover Tunnel was on the [illegible]

1931. He thought it would [illegible]

for copperas water and from [illegible]

than the land [illegible]

Where the water [illegible]

is upon this [illegible]

subsidence of [illegible]

CONSOLVE [illegible]

testimony is [illegible]

the present [illegible]

land, and [illegible]

appear that [illegible]

is removable. [illegible]

indefinitely [illegible]

COAL CO., [illegible]

CO., 180 Illinois [illegible]

insufficient to support [illegible]

or to any [illegible]

We are further [illegible]

been shown that [illegible]

sider, [illegible]

who claims to have [illegible]

timony as [illegible]

vated and the improvements [illegible]

of the land value for obvious reasons other than overflow. This being the state of the evidence the jury were necessarily left to guess at the value or to use general information wholly outside of the record in this case.

Since this case will have to be retried it is proper to note that one of the instructions given instructed the jury that if it found certain facts to be true it should find the defendant guilty. This instruction failed to note some of the defenses which were supported by evidence, and the giving of this instruction constituted error.

The judgment of the Circuit Court of Williamson County, Illinois, will be reversed and the cause remanded for a new trial.

Reversed and remanded.

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of the land value of [illegible]
being the place of the [illegible]
guess at the value [illegible]
of the record in this [illegible].

Since this [illegible]
that one of the [illegible]
found certain [illegible]
This instruction [illegible]
supported by evidence, [illegible]
estimated error.

The judgment of the [illegible]
note, will be reversed [illegible]
Reversed and remanded.

IN THE

APPELLATE COURT OF ILLINOIS,

Fourth District.

Term No 22 May T 1938 Opinion Filed Nov 15

RUSH L. CRATON, Administrator of the Estate of Winifred E. Craton, deceased, Plaintiff-Appellant, vs. ALTON UNITED CAB COMPANY, Inc., a corporation, and WARREN SLANKER, Defendants-Appellees.	Appeal from City Court of Alton, Madison County, Illinois. Honorable Wm. P. Boynton, Trial Judge.

297 I.A. 652

STONE, J.

This is an appeal from a judgment non obstante veredicto of the City Court of Alton, Madison County, Illinois, ordering that the plaintiff-appellant, Rush L. Craton, administrator of the estate of Winifred E. Craton, deceased, take nothing by his suit against Alton United Cab Company, Inc., a corporation, and Warren Slanker, defendants-appellees, in an action for wrongful death.

On the evening of February 1, 1936, the Alton United Cab Company through its employee Warren Slanker received the plaintiff's intestate as a passenger for hire in the defendant company's taxicab. During the course of the transportation the taxicab ran against the street curb. Plaintiff's intestate, who was nine months pregnant, was thrown against the side of the cab. Later plaintiff's intestate had a hemmorrhage of the uterus and died as a result thereof. While the testimony of the attending physician was to the effect that the accident could not have caused the hemmorrhage and death, there was other expert testimony that it could, and the jury found specially that the injury caused the death.

The plaintiff called the defendant Warren Slanker, who was the driver of the cab, as his witness. The driver testified, in substance, that the street on which the accident occurred was on a hill, and that there was hard snow on the street. He said, "some way my back wheels got caught in the rut of the street car tracks -- it was hard snow -- and when it ended up I skidded, ending

APPELLATE COURT OF ILLINOIS,

Fourth District.

HUGH L. GRATON, Administrator of the Estate of Winifred E. Graton, deceased, Plaintiff-appellant, vs. ALTON UNITED GAS COMPANY, Inc., a corporation, and WALTER E. BLANKER, Defendants-appellees.	Appeal - from the City Court of Alton, Madison County, Illinois. 29 P. A. 248. Hon. H. E. Norton, Trial Judge.

BROWN, J.

This is an appeal from a judgment [illegible] the City Court of Alton, Madison County, [illegible] the plaintiff-appellant, Hugh L. [illegible] tate of Winifred E. Graton, deceased, [illegible] gainst Alton United Gas Company, Inc., [illegible] Blanker, defendants-appellees, [illegible] for wrongful death.

On the evening of February 1, 1933, the Alton United Gas Company through its employee Warren Murphy [illegible] the plaintiff's intestate as a passenger [illegible] the defendant's commercial restaurant. During the course of the trip [illegible] the car was run into [illegible] gainst the street curb. [illegible] pregnant, was thrown [illegible] intestate had a [illegible] thereof. While the [illegible] the effect that the [illegible] and death, there [illegible] jury found specially [illegible]

The plaintiff [illegible] the [illegible] the driver of the [illegible] substance, that the street [illegible] a hill, and that [illegible] "none way my back wheels got a [illegible] brake -- it was hard down -- [illegible]

into Broadway and Pearl". He said that it was around 6:30 P. M. and was dark. He thought he had chains on both back tires. He was going 15 to 20 miles per hour. The car skidded sideways but did not turn completely around. There was no damage to the car. He drove it away. The passenger gave no evidence of being in pain.

The other evidence of the plaintiff consisted of testimony connecting up the occurrence testified to by Slanker with a ride taken by the plaintiff's intestate that evening.

The defendant offered no evidence.

The cause was submitted to the jury, and a verdict was returned finding the defendant, Alton United Cab Company, guilty and finding the employee, the defendant Warren Slanker, not guilty. Damages were assessed at $5,000.00.

The trial court denied the plaintiff's motions for a judgment non obstante veredicto and for a new trial.

The trial court allowed the defendant Cab Company's motion for judgment non obstante veredicto and entered judgment for both defendants and against the plaintiff for costs.

The only negligence charged was the management of the taxicab. In HAYES v. CHICAGO TELEPHONE CO., 218 Illinois 414, on page 418, the rule applicable to this situation is well stated: "In such an action whether brought against the employer severally or jointly with the employee, the gravamen of the charge is and must be, the negligence of the employee; and no recovery can be had unless it be proved and found by the jury that the employee was negligent."

The plaintiff contends, however, that the situation is one in which the doctrine of res ipsa loquitur applies, and the defendant having introduced no evidence, failed to sustain the burden of defense, and was error for the trial court to submit the issues to the jury.

"When a thing which has caused an injury is shown to be under the management of the party charged with negligence and the accident is such as in the ordinary course of things will not happen if those who have such management use proper care, the accident itself affords reasonable evidence, in the absence of an explanation,

into Broadway [illegible]
and was dark. [illegible]
was going 15 [illegible]
did not turn [illegible]
He drove it [illegible]

The [illegible]
connecting [illegible]
taken by [illegible]

The defendant [illegible]

The cause was [illegible]
turned finding [illegible]
and finding [illegible]
Damages were [illegible]

The trial court [illegible]
non obstante [illegible]

The trial [illegible]
for judgment [illegible]
defendants and [illegible]

The [illegible]
cab. In HAMMO v. [illegible]
118, the rule [illegible]
such an action [illegible]
jointly with the [illegible]
be, the merits [illegible]
it be proved [illegible]

The [illegible]
which the doctrine [illegible]
having introduced [illegible]
tense, and was [illegible]
jury.

"When a thing [illegible]
the management of [illegible]
is such as [illegible]
those who have [illegible]
self afforde [illegible]

that it arose from the want of proper care." FELDMAN v. CHICAGO RWYS. CO., 289 Illinois, 25, on 34. Such would have been the situation in this case if the evidence had merely shown the contract of carriage and the fact of the accident and injury. This proof went further. It showed in detail the weather conditions and street conditions which caused the taxicab to slide against the curbing and injure the passenger. It went into the details of the speed and other management of the taxicab.

The only thing left concerning the cause of the accident was the conclusion to be drawn from the driver's statement of his management of the taxicab.

"The presumption raised by the doctrine does not require evidence to the contrary of equal weight to overthrow it, for such a presumption is not of itself evidence but raises a rule of evidence and yields to any contrary proof. Therefore when the surrounding circumstances leave room for a different presumption the reason for the rule fails." HERBERT v. LEVY, 279 Illinois Appellate, 353, on 361.

It seems clear to us that the circumstances surrounding this accident leave ample room for different conclusions concerning the management of the taxicab. It seems clear, also, that the evidence discloses that the situation was not entirely in the control of the defendants. We therefore conclude that the doctrine of res ipsa loquitur has no application to this case and we are of the opinion that the issues were properly submitted to the jury. We think the jury could reasonably have found that there was no negligence in the management of the taxicab and see no reason to disturb its finding in that respect.

The trial court properly held that the finding of the jury precluded judgment against the defendant, Alton United Cab Company.

The judgment of the City Court of Alton will therefore be affirmed.

Affirmed.

that it arose [illegible]

[illegible] Co., 229 Illinois, [illegible]

situation in this case if [illegible]

tract of carriage [illegible]

proof went further. It [illegible]

and str[illegible] conditions [illegible]

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of the open [illegible]

The only thing [illegible]

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management of the track.

"The [illegible]

evidence to the contrary [illegible]

such a presumption [illegible]

of evidence and [illegible]

<u>surrounding circumstances [illegible]</u>

<u>the reason for the rule [illegible]</u>." [illegible] v. [illegible]

Appellate, 385, on 381.

It seems clear [illegible]

this accident leave [illegible]

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evidence discloses that [illegible]

trol of the [illegible]

of res ipsa loquitur [illegible]

of the opinion that the [illegible]

We think the jury [illegible]

negligence in the [illegible]

disturb its finding [illegible]

The trial court [illegible]

precluded judgment [illegible]

The judgment of the [illegible]

affirmed.

Affirmed.

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

~~OCTOBER~~ May TERM, A.D. 1938.

Term No. 13 | Agenda No. 1

THE PEOPLE OF THE STATE OF ILLINOIS, for the Use of R.D. SHEPHERD, As Conservator of the Estate of Meli Tomlonovich, Incompetent, Plaintiff and Appellee,

vs.

MARKO PRPICH, S. ANGELI and T.I. GALLOWAY, Defendants,

Separate Appellant, T.I. GALLOWAY, Appealing.

Appeal from the Circuit Court of Franklin County.

Murphy, J:

R.D. Shepherd as conservator of the Estate of Meli Tomlonovich, an incompetent, hereinafter referred to as plaintiff, instituted this suit to recover on a bond which had been given as an official bond by the preceding conservator of said ward. The bond was signed by Marko Prpich as principal and S. Angeli and T.I. Galloway as surieties.

Prpich and Angeli did not appear and a judgment in debt and for damages was entered against them. Galloway hereinafter referred to as defendant filed an answer. On a trial the court at the close of all the evidence, directed a verdict of damages against the defendant for $3139.22 and entered judgment for that amount. This appeal is from that judgment.

The questions raised on this appeal are as to the correctness of the court's rulings on the pleadings, the admission and rejection of evidence and in directing a verdict for the plaintiff.

The plaintiff moved to strike various paragraphs of defendant's answer. Defendant moved that the motion be carried back to the complaint. Defendant's motion was overruled and plaintiff's motion to strike was allowed and paragraphs 1,2,3,4,5 and 6 were stricken.

It was alleged in the complaint that the county court of Franklin County did on the 17th day of February, 1921, appoint Marko Prpich as conservator of said ward, an incompetent person, that Prpich duly qualified and proceeded to act as such conservator until November 14, 1932 when he was removed by order of the said county court; that during the time he held said position the county court did in November 1928 order him to file a new bond, and that pursuant to such order Prpich filed the bond declared upon. The breach of the bond relied upon was that the county court in 1932 adjudged that Prpich should pay to his successor, the plaintiff herein, $3388.34 and had ordered him to make such payment which he had failed to do.

The substance of the paragraphs of the answer which were stricken was that the county court of Franklin County was not duly organized on the date the ward was adjudged incompetent and Prpich was appointed, that it was not sitting in probate, that no petition was filed by a reputable citizen of the county asking for the appointment of a conservator, that the issue of the ward's mental condition was not determined by a jury, that no summons venire, subpoena or other process issued out of said court at said term in said proceeding and no such process was filed in said court, that the only property the ward owned at the time of Prpich's appointment was the right to participate with his mother in a certificate issued under the War Rish Insurance Act

enacted for the benefit of soldiers of the World War, that the payment of the same was under the benevolent supervision of the Veterans Administration and that such interest was not a property right sufficient to warrant the county court's exercise of jurisdiction in the making of the appointment, that the bond filed was worded as a guardian's bond and not as a conservators' bond.

Sec. 18 Act VI of the Constitution provides that county courts shall have original jurisdiction in the matter of the appointment of guardians and conservators and settlement of their accounts. When the county courts have acted in the exercise of such jurisdiction their judgments and decrees cannot be questioned collaterally. Illinois Merchants Trust Co. vs. Turner 341 Ill. 101; Hoit vs. Snodgrass 315 Ill. 548; Sheahan vs. Madigan 275 Ill. 372; Dodge vs. Cole 97 Ill. 338; Wing vs. Dodge 80 Ill. 564; Searle vs. Galbraith 73 Ill. 269. Where the court had jurisdiction of the subject matter and the parties its judgment or decree cannot be questioned collaterally, no matter how erroneous it may be. Hoit vs. Snodgrass, supra. It is the settled law that the county court, when adjudicating upon questions of which it has general jurisdiction, is entitled to as liberal intendments in favor of its jurisdiction as are extended to the acts of courts of general jurisdiction, Bostwick vs. Skinner 80 Ill. 147; Wight vs. Wallbaum 39 Ill. 554 and this rule applies in all its force to the acts of the county court in conservator proceedings for in these matters it exercises a general jurisdiction. Hoit vs. Snodgrass, supra.

The allegations in the answer that no summons venire, subpoena or other process issued out of said court at said term and that no such process was filed in said court is not a statement of fact which negatives the county court's jurisdiction of the person of the ward. By the allegation the issuance of the

process was limited to the term of court at which the appointment was made. Granting the county court proceeding the liberal intendments to which it is entitled it may be assumed that the court acquired jurisdiction of the ward by the service of process at a term prior to the one at which the letters of conservatorship were issued. Also by Sec. 12 Chap. 85 Ill. Rev. Stat. 1937 the county court may appoint a conservator following an adjudication of insanity and in such case the court acquires jurisdiction of the incompetent by virtue of the insanity proceeding and no further process need issue before a conservator is appointed.

The allegations of the answer were insufficient to raise an issue on the jurisdiction of the county court as to the subject matter or the person of the ward. The other questions attempted to be raised by the answer were in reference to matters that cannot be raised in a collateral proceeding.

In Fecht vs. Freeman 251 Ill. 84, 99 the court said, "The authorities in this State are all one way upon the question that the county courts of this State, in the appointment of guardians, administrators and conservators, are judges of their own jurisdiction."

It was not necessary that all the facts and circumstances which justified the acts of the county court should affirmatively appear upon the face of the proceeding. Illinois Merchants Trust Co. vs. Turner, supra; Propst vs. Meadows 13 Ill. 157. The court properly overruled defendant's motion to carry the motion to strike back to the complaint. There was no error in striking from defendant's answer the paragraphs indicated.

Pursuant to Supreme Court Rule 18 the defendant called upon plaintiff to admit as true a certain statement of facts. Plaintiff admitted their truth but reserved the question of their materiality. On the trial the court refused to admit the same in evidence. The facts rejected were in reference to the citizenship of the former conservator Prpich, and the citizenship of the ward.

It was admitted to be true that the ward was an alien unlawfully in the United States and that subsequent to the appointment of a conservator in 1921 he had been deported.

The citizenship of the conservator and the ward and the question of their residence were matters for the determination of the county court and could not be reviewed in this collateral proceeding. Fecht vs. Freeman, supra; Dodge vs. Cole 97 Ill. 338. The statement of facts although admitted by plaintiff to be true was properly rejected as evidence.

Defendant contends that the bond was of no effect for the reason that it described Prpich as guardian and referred to the trust he was to fill as being one of guardianship instead of conservatorship. Prpich who had been named as conservator and had acted in that capacity for several years gave the bond sued upon, in compliance with an order of the county court that he give a new bond. The defendant signed the bond enabling Prpich to comply with such order. The court accepted the same as a new bond from Prpich as conservator. By reason of the giving of said bond Prpich was privileged to continue to act as conservator and receive his ward's property. Under such conditions defendant as a surety on the bond is estopped to raise the question as to the wording of the bond.

Aside from the matters referred to defendant did not interpose any defense to plaintiff's action and the court properly directed a verdict for the plaintiff.

Judgment Affirmed.

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STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

MAY TERM, A.D. 1938.

Term No. 15 | Agenda No. 11

VIOLA ELLEN WOLLARD, Administratrix of the Estate of FRANCIS MARION WOLLARD, Deceased,
Plaintiff-Appellee,

vs.

M.QUINN, Administrator of the Estate of LESTER NORMAN, Deceased,
Defendant-Appellant.

Appeal from the Circuit Court of Williamson County, Illinois.

297 I.A. 650

Murphy, J:

This court granted defendant leave to appeal from an order setting aside a verdict in his favor. The facts in the case and the law applicable thereto require our affirmation of the order of the trial court.

Plaintiff sued to recover damages sustained by reason of the alleged wrongful death of her intestate. He died as the result of injuries sustained by being struck by an automobile driven by Lester Norman. After verdict and during the pendency of the motion for a new trial, Norman died and defendant as the legal representative of his estate was substituted.

The record does not disclose what rulings the trial court deemed to be erroneous. Defendant contends that the verdict should have been sustained for the reason that plaintiffs intestate was guilty of contributory negligence as a matter of law and that defendant's motion for a directed verdict made at the close of all the evidence should have been granted.

The accident happened in the City of Herrin at the intersection of North Park Avenue, (a north and south avenue) and Herrin Street which intersected the Avenue at right angles.

The Avenue has a paved driveway 50 feet in width. At the intersection there is an off-set so that the west curb north of Herrin Street is not on a line with the west curb south of the intersection, the north one being about 20 feet farther east. The line that marks the dividing line between the north and south bound traffic lanes follows in part the off-set and at the point of the accident is 19 feet from the west curb and 31 feet from the east. After dark on the evening of October 11, 1936, deceased was seen near the northeast corner of the intersection on the sidewalk on the east side of Park Avenue. He started to cross from the east to the west side. The evidence is not clear whether he stepped from the sidewalk to the pavement at the regular crossing for pedestrians or a few feet north of it but it is clear that when he stepped on to the pavement he looked in both directions. When he was on or near the line that divided the traffic lanes he was struck by the Norman car and his body was hurled about 60 feet to the north and west. There is a conflict in the evidence as to the distance the deceased was north of the cross walk when he was struck but all the evidence shows that he was not within the space where pedestrians usually cross. The deceased is described as being a large man, 72 years old, one arm, crippled with rheumatism and walking with a cane.

The Norman car was going north on Park Avenue and approached the intersection at a speed of 30 to 35 miles per hour. Its headlights were burning. A street light and lights from nearby oil stations illuminated the intersection and the immediate surroundings.

Defendant contends that the deceased was "jay walking" and that therefore as a matter of law was guilty of such contributory negligence as to bar plaintiff's right of recovery.

Section 172 Chap. 95½ Ill. Rev. Stat. 1937 provides that every person crossing a roadway at any point other than within a marked cross walk or within an unmarked crosswalk at an intersection, shall yield the right-of-way to all vehicles upon the highway.

By Section 171 of said Act it is provided that in the absence of traffic control signals the driver of a vehicle shall yield the right-of-way, slowing down or stopping if need be to so yield to a pedestrian crossing the roadway within any marked cross walk or within an unmarked crosswalk at an intersection.

Section 172 does not prohibit a pedestrian from crossing a street at any point other than at the regualr crossing but it makes his right to the use of such places inferior to all vehicles upon the highway. Considering the two sections together it is apparent that the purpose was to exact from the pedestrian who crosses a street at a point other than at a crosswalk, a higher degree of care than at street intersections and crossings where he has the right-of-way over vehicles.

There is evidence which tends to show that deceased had reached the line that marked the division between the two traffic lanes thereby placing him closer to the west curb than the east, and beyond the lane in which Norman was required to drive.

For the purpose of passing upon defendant's motion for a directed verdict the court must assume such evidence to be true. In complying with the statutory requirement of yielding the right-of-way to vehicles, deceased had the right to assume that the vehicles would comply with the law by driving on their proper side of the street. Under such a state of facts the question of deceased's contributory negligence became one of fact and the court properly submitted it to the jury.

Instruction No. 16 given at the request of the defendant was Par. A. of Section 172 as above quoted. The instruction did not include Par. d of said section which is a material provision and should have been included.

An instruction couched in statutory language may be properly given but it must set forth the essentials of the act of legislation, and if it omits a material element thereof, is improper. This is based upon the fundamental principle governing instructions, that the courts charge must correctly state the law. Gamble vs. Hayes Transfer & Storage Co. 278 Ill. App. 365.

Instruction No. 14 given at the request of defendant told the jury that there was no presumption that the defendant was negligent in the operation of his automobile from the mere fact alone that the automobile of the defendant collided with plaintiff's intestate and that as a result thereof he received injuries from which he died. In West Chicago St. Ry. Co. Vs. Petters 196 Ill. 298 in considering a similar instruction it was said, "This class of instructions, which select one item of evidence or one fact disclosed by the evidence and state that a certain conclusion does not follow, as a matter of law, from that fact, are calculated to mislead and confuse a jury. The case of Drainage Comrs. vs. Illinois Central Railroad Co. 158 Ill. 353, was reversed on this character of instructions. If an instruction of this nature were held proper, it would be possible for a defendant to select each 'mere fact' constituting the entire chain of facts by which negligence was proved, and enable the court to instruct the jury that each of these links in the chain did not, of itself, constitute negligence, and while each particular link might not, of itself, constitute negligence, yet the whole, taken together, would, and thereby the court would be enabled to instruct the jury on the facts and take away the consideration of facts from them."

Defendant's instruction No. 17 told the jury that the preponderance of evidence in a case is not necessarily determined by the number of witnesses testifying to a particular state of facts and then named the things the jury should consider in

determining where the weight and preponderance of the evidence really lies but omitted any reference to the number of witnesses. The eye witnesses to the accident all testified on behalf of plaintiff and while numbers alone was not controlling it was a fact that the jury might well have considered in determining whether plaintiff had proven her case by the greater weight of the evidence. This instruction was also subject to the criticism directed at a similar instruction in Union Traction Co. vs. Hampe 228 Ill. 346 where it is pointed out that an instruction should not be worded so as to command the jury to consider only the matters specified in the instruction but that it should be left open for them to consider all the facts and circumstances in determining the weight of the evidence.

Plaintiff contends that it was error to admit in evidence defendant's blue print of the intersection. It was not identified as being accurate and should not have been admitted. It was used by counsel for both parties on their respective cross-examinations of the several witnesses. Witnesses were asked to mark on the blue print with a pencil the place where the witness was standing at the time of his observation of the thing he was testifying about. Witnesses were also asked to mark on the blue print with a pencil the estimated location of certain things such as light posts, signs etc. It was all done without scale and without relevancy as to distances. Innumerable marks were made so that when it went to the jury for their examination it presented an array of marks which were not connected by the evidence.

There was sufficient error in the record to warrant the trial court in granting a new trial.

Judgment Affirmed.

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STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

MAY TERM, A.D. 1938.

Term No. 20 | Agenda No. 14

WALTER CHATTILLION, Conservator of the Estate of GEORGE LaPERCH, Plaintiff-Appellant,

VS.

JACOB DLUGON and CHARLES DLUGON, Defendants-Appellees.

Appeal from Circuit Court of St. Clair County, Illinois.

Murphy, J:

Walter Chattillion as conservator of the estate of George LaPerch brought this action to recover damages for personal injuries sustained by his ward when he was struck by a truck owned by the defendant Jacob Dlugon and which at the time was being driven by defendant, Charles Dlugon.

Plaintiff's ward was injured when he was undertaking to walk from the west to the east side of a State road in the northerly edge of a thickly settled unincorporated community known as North Dupo. The accident happened about 6 P.M., November 11, 1936, at a point on the highway described as being 300 feet south of a bridge that spans Prairie DuPont Drainage canal. Leaving the bridge at its south end the road curves in a southeasterly direction and when 100 feet from the bridge extends in a southerly direction. It is down grade from the bridge into North Dupo, The extent of the grade or the curve is not shown. The concrete driveway was 18 feet wide with dirt shoulders on each side and upon which there was a guard fence four feet from the roadway.

George LaPerch, 71 years old, was employed by Walter Chattillion and on the occasion in question was walking easterly from the Chattillion home in the direction of the hard road with the intent of crossing to the east side. As he came near the driveway but before he stepped on to the concrete an automobile passed in front of him going south. Another automobile was following the first by a distance of 200 feet. After the first one had passed LaPerch passed in front of the second one when it was 30 feet north of him. He reached the black line that marked the center of the driveway and the second automobile passed behind him. Defendant's truck followed the second automobile across the bridge and after leaving the bridge it was 50 to 60 feet behind car number 2. The defendant undertook to pass the car that was ahead of him and drove the truck to his left or into the north bound traffic lane. Car number 2 was traveling 30 miles per hour and defendant's truck was going slightly faster. Both the car and the truck had their headlights burning. LaPerch testified that he saw the first car when it passed in front of him, that he saw car number 2 when he passed in front of it but that he did not see defendant's truck at anytime before he was struck.

The only question presented on this appeal is as to the correctness of the court's ruling directing a verdict for the defendant at the close of plaintiff's evidence.

In the consideration of such question the plaintiff is entitled to the benefit of all the facts that the evidence tends to prove and all just inferences that can be drawn therefrom, and the evidence most favorable to plaintiff must be taken as true. Pollard vs. Broadway Central Hotel Corp. 353 Ill. 312; Libby, McNeill & Libby vs. Cook 222 Ill. 216.

The burden was on plaintiff to affirmatively show that LaPerch was in the exercise of due care and caution for his own safety at the time of and immediately before the accident and ordinarily it presents a question of fact for the jury. It becomes one of law where the undisputed evidence establishes that the accident resulted from the negligence of the injured party. If there may be a difference of opinion on the question, so that reasonable minds will arrive at different conclusions then it is a question of fact for the jury. Heidenreich vs. Bremner 260 Ill. 439.

The rule of law which gives drivers of vehicles and pedestrians on the public highway equal rights does not excuse pedestrians from exercising due care for their own safety.

LaPerch's only excuse for not seeing the truck is that it was behind car number2. When he was on the west side of the pavement waiting for the first car to pass, car number 2 and the truck were either on the bridge or just south of it for the evidence is there was 200 feet distance between the first and second car and 50 to 60 feet between the second car and the truck and the distance from the bridge to where LaPerch undertook to cross was 300 feet. When LaPerch was waiting for the first car to pass he could have looked north and seen both car number 2 and the truck for if either the car or the truck was on the curve, which extended south of the bridge 100 feet, that would place the truck in such a position that his view was not obstructed by car number 2.

If the car and the truck were south of the curve they were within 200 feet of him with their lights burning and there is no reason apparent why he could not have seen the truck or the reflection of its lights if he had looked for it.

Furthermore when LaPerch reached the center line of the pavement he was still in a position where the exercise of due care required him to look for approaching automobiles.

Even though defendant was negligent in undertaking to pass the car ahead of him at this point that did not excuse La Perch from using due care for his own safety. He had crossed in front of car number 2 with a space of 30 feet between him and the car and had reached the center line of the pavement in safety. As far as the evidence shows had he remained on the center line defendant's truck would have passed in front of him. But having made one adventurous flight across the west half of the pavement he tries another. There is no evidence tending to show that he looked for an approaching car. From the distances shown in the evidence it is clear that defendant's truck was at that time approaching LaPerch with its lights burning and was within 60 feet of him traveling at 35 or 40 miles per hour.

Under such a state of facts all reasonable minds would agree that LaPerch's failure to exercise due care contributed to his injury.

Without regard to the question of the sufficiency of the evidence to establish the negligence charged we find that the court's ruling in directing a verdict for the defendant should be supported on the grounds that plaintiff did not show LaPerch was in the exercise of due care.

Judgment Affirmed.

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STATE OF ILLINOIS,
APPELLATE COURT,
FOURTH DISTRICT.

Agenda 6.
May Term, 1938.

The Bradford National Bank of Greenville,
a Banking Corporation,
Appellee,

vs.

Armoni J. Floyd, Emma A. Floyd, Areta Wisnasky and Harold M. Floyd,
Appellants.

Appeal from Circuit Court of Bond County.

297 I.A. 651

EDWARDS, J.

On May 12, 1934, defendant Armoni J. Floyd and his wife Emma A. Floyd executed a real estate mortgage to secure two notes, one for $3200 payable to defendant Areta Wisnasky, their daughter, and one for $525 payable to defendant Harold M. Floyd, their son. Two days later, plaintiff, a creditor of said mortgagors, obtained a judgment by confession against them in the sum of $2,016.05, and execution issued thereon was returned unsatisfied. The following September plaintiff filed this suit to set aside the mortgage on the grounds of fraud and want of consideration, and that it was given for the purpose of hindering and delaying plaintiff in the collection of its judgment.

At the trial there were submitted to a jury two questions; first, was the mortgage given fraudulently for the purpose of hindering and delaying plaintiff, and second, was it without consideration. The jury answered

both interrogatories in the affirmative, and the Chancellor approved of their findings and entered a decree granting plaintiff the relief prayed for, from which this appeal has been prosecuted.

The proof shows that for a number of years prior to 1934 the mortgagors had been borrowers from plaintiff, a banking institution at Greenville, and that on a number of occasions, as late as 1933, they had rendered to plaintiff written statements of their financial condition, listing their obligations, but in no instance showing any debts to either their son or daughter.

Defendant Armoni J. Floyd produced that he claimed was a copy of a financial statement given by him to plaintiff on August 12, 1933, which showed him to be indebted to his daughter in the sum of $2,432.20; he, however, failed to produce copies of any other statements which he at any time had given the bank. It further appears that thereafter, on September 28, 1933, and before the execution of the mortgage, he gave plaintiff a financial statement in which all of the indebtedness was listed as belonging to the bank; the items "Notes Payable to Others" and "All Other Debts" being left blank, and no claim being therein made of any debts to the son or daughter. It seems indeed strange that in his statement of August 12, 1933, he should list indebtedness to his daughter of $2,432.20, and a few weeks later, over his signature, solemnly declare his total obligations with no mention made of a debt to her.

The son and daughter both testified that they had for some years prior to the date of the mortgage loaned various sums to their father which they had earned at different employments, but some of their statements relative thereto seem somewhat improbable. Upon a consideration of the testimony we are of opinion that the jury was warranted in finding both that the mortgage

was executed with fraudulent intent and to hinder and delay plaintiff in the collection of its debt, and that it was without consideration, and that the chancellor rightfully adopted the jury's advisory finding and correctly rendered a decree for plaintiff.

Defendants submitted to the court an instruction as follows: "The court instructs the jury that A. J. Floyd had the lawful right to mortgage his land to his daughter and son for a debt owed to them by said A. J. Floyd. And if the said A. J. Floyd was indebted to his daughter and son, he had a right to secure them in preference to other parties that he may have owed, and his doing so would not in law be deemed fraudulent." The court refused to so charge the jury, and such action is assigned as error.

The rule governing in such transactions is aptly stated in Bartel v. Zimmerman, 293 Ill., at page 163, as follows: "It is the established rule of law in this State that a debtor may prefer a creditor or creditors and that such preference is valid notwithstanding the claims of other creditors, provided the debt preferred is actual and the property transferred does not greatly exceed the amount of the claim, and that the transaction is not a mere device to secure an advantage to the debtor, or to hinder, delay or defraud other creditors;" and to the same effect, Wick v. Catavenie, 331 Ill., 240; Rice-Stix Co. v. Albrecht & Co., 273 Ill., 447; Dillman v. Nadelhoffer, 163 Ill., 625.

As thus stated, one of the requisites necessary to sustain the conveyance is that it must be in good faith and not simply a scheme or device to secure an advantage to the debtor or to defraud other creditors. The instruction as tendered lacked this essential element, hence was erroneous and properly refused.

We think the decree upon the record as made was warranted and should be affirmed.

Decree affirmed.

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